



# THE UNIVERSITY *of* EDINBURGH

This thesis has been submitted in fulfilment of the requirements for a postgraduate degree (e.g. PhD, MPhil, DClinPsychol) at the University of Edinburgh. Please note the following terms and conditions of use:

- This work is protected by copyright and other intellectual property rights, which are retained by the thesis author, unless otherwise stated.
- A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.
- This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author.
- The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author.
- When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given.

THE ATTITUDE OF THE CHURCH AND STATE  
IN SCOTLAND TO SEX AND MARRIAGE: 1560-1707.

by

John R. Hardy

M.Phil.  
University of Edinburgh  
1978

## ACKNOWLEDGEMENTS.

It is impracticable to acknowledge the debts that I owe to all the people who have helped and encouraged me in the last six years, both during my research at Edinburgh and when writing the thesis in Fulham. There are some, however, who should be singled out for a special mention. It was only with the help of my father, Mr Eric S Hardy, that I was able to take up the offer of a place at Edinburgh University and undertake my first year of postgraduate study. A grant from the SSRC enabled me to carry out a further two years of research. The staff in the Scottish Record Office, the National Library of Scotland, the departmental University libraries, and particularly the University Library were always helpful. My supervisors, Dr M Anderson and Professor C Smout, encouraged me in my endeavours and provided useful criticisms at every stage of my research. The Faculty of Social Sciences Postgraduate Studies Committee have shown exceptional patience without which I would not have been able to present this thesis. My greatest debt, however, is to Alison my wife who has spent the first years of our marriage typing the drafts of the thesis. Any mistakes and misinterpretations of the material are, however, my own.

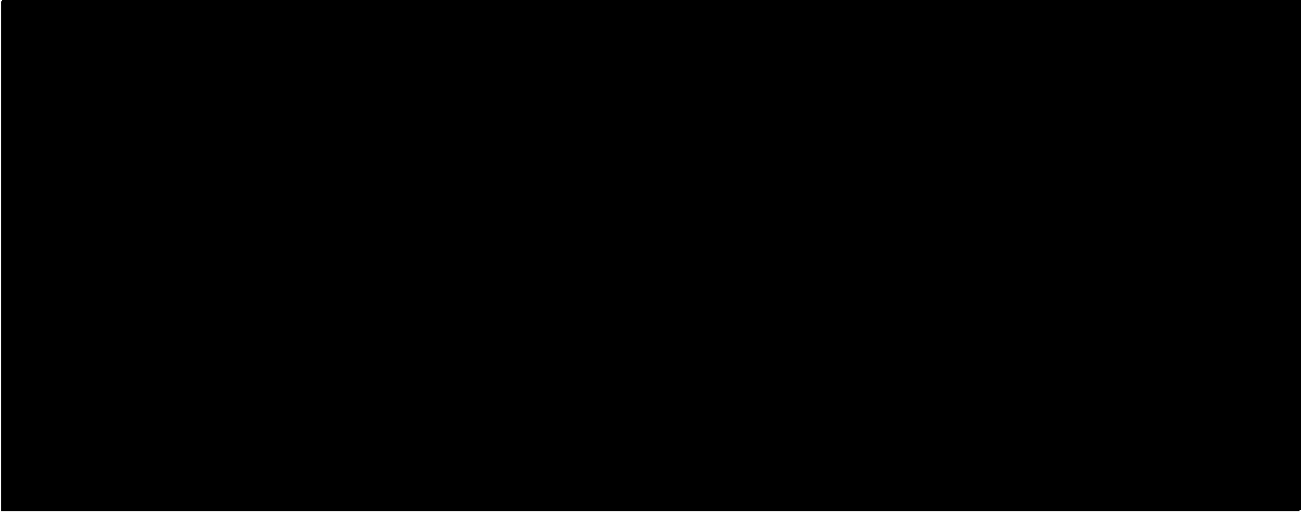


Table of contents.

Acknowledgements

Table of contents

Abstract

Introduction

1. Historical background.
2. The sociology of the traditional household:
  - 2.1. introduction,
  - 2.2. crises in the life-cycle of the household,
  - 2.3. discussion.
3. The Canon Law in pre-Reformation Scotland:
  - 3.1. theology of marriage;
    - 3.1.1. marriage as a sacrament,
    - 3.1.2. marriage and the control of sex,
    - 3.1.3. remarriage,
    - 3.1.4. social functions of marriage,
    - 3.1.5. theological essentials for a marriage to be valid,
    - 3.1.6. kinds of marriage.
  - 3.2. betrothal;
    - 3.2.1. definition and requirements,
    - 3.2.2. legal force,
    - 3.2.3. impediments to betrothal.
  - 3.3. Irregular or clandestine marriages, and legal proofs of marriage;
    - 3.3.1. definition of clandestine marriage,
    - 3.3.2. restrictions on time and place,



- 3.3.3. banns,
- 3.3.4. legal proofs of marriage.
- 3.4. Divorce and dispensations;
  - 3.4.1. annulment and separation,
  - 3.4.2. separation for adultery,
  - 3.4.3. analysis of 'Liber Officialis',
  - 3.4.4. dispensations.
- 3.5. Impediments;
  - 3.5.1. impediment and diriment impediments,
  - 3.5.2. consanguinity,
  - 3.5.3. affinity,
  - 3.5.4. spiritual relationship,
  - 3.5.5. force and fear.
- 3.6. Postscript.
- 4. The celebration of marriage: 1560-1700:
  - 4.1. temporal regulations;
    - 4.1.1. prohibited seasons,
    - 4.1.2. day of the week.
  - 4.2. miscellaneous regulations;
    - 4.2.1. Christian knowledge,
    - 4.2.2. who solemnises marriage,
    - 4.2.3. where.
  - 4.3. banns;
    - 4.3.1. the maintenance of the basic system,
    - 4.3.2. the purpose of banns,
    - 4.3.3. implications.
  - 4.4. parental consent;
    - 4.4.1. the attitude of the Church of Scotland,
    - 4.4.2. Civil law,

- 4.4.3. legal remedies for a marriage without parental consent,
  - 4.4.3.1. the impediment of force and fear,
  - 4.4.3.2. rapt,
  - 4.4.3.3. action before the Privy Council,
- 4.4.4. summary,
- 4.4.5. implications.
- 4.5. deflowering of virgins: a claim for marriage;
- 4.6. the marriage service;
  - 4.6.1. versions,
  - 4.6.2. structure,
  - 4.6.3. exhortation,
  - 4.6.4. summary.
- 4.7. the attitude of the authorities to marriage festivities;
  - 4.7.1. the State,
  - 4.7.2. the Church,
  - 4.7.3. summary and implications.
- 5. Irregular marriages:
  - 5.1. legislation anent irregular marriage;
    - 5.1.1. precedents,
    - 5.1.2. the legislation of the 1640's,
    - 5.1.3. legislation 1661 to 1711,
    - 5.1.4. the Act of Toleration,
    - 5.1.5. summary.
  - 5.2. legal proofs of marriage;
    - 5.2.1. types of proof,
    - 5.2.2. problems of interpretation,
    - 5.2.3. summary.

## 6. Divorce, separation and annulment:

### 6.1. divorce for adultery;

6.1.1. the introduction of divorce,

6.1.2. remarriage of the guilty party 1566-1589,

6.1.3. remarriage and the Acts of Parliament of 1592 and  
1600,

6.1.4. summary.

### 6.2. divorce for desertion;

### 6.3. separation and annulment;

6.3.1. separation from bed and board,

6.3.2. annulment - impotency.

### 6.4. summary.

## 7. Incest:

### 7.1. introduction;

### 7.2. the Reformation settlement and later developments;

7.2.1. the Reformation settlement,

7.2.2. the legislation of 1649,

7.2.3. the later seventeenth century,

7.2.4. summary.

### 7.3. problems of interpretation;

7.3.1. the extension of the forbidden degrees,

7.3.2. relationships established by intercourse.

### 7.4. the 'horror' of incest;

### 7.5. summary.

## 8. Adultery:

### 8.1. introduction;

### 8.2. Acts of Parliament anent 'notour' adultery;

### 8.3. the application of statute law;

- 8.4. civil penalties for single adultery;
  - 8.4.1. central government,
  - 8.4.2. burgh laws,
- 8.5. religious penalties;
- 8.6. summary.
- 9. Sexual relationships between the unmarried:
  - 9.1. fornication;
    - 9.1.1. legislation by the State,
    - 9.1.2. the punishment of fornication by the Church,
    - 9.1.3. laws anent prostitution,
    - 9.1.4. fornication and illegitimacy.
  - 9.2. ante-nuptial fornication;
  - 9.3. discussion.
- 10. Conclusions.
- 11. Bibliography:
  - 11.1. abbreviations,
  - 11.2. contemporary sources,
  - 11.3. Scottish secondary material,
  - 11.4. comparative and sociological secondary material.

#### Appendices:

- 1. Notes on sources;
  - 1.1. the 'Cathecism of 1552',
  - 1.2. William Hay's 'Lectures on Marriage',
  - 1.3. Statutes of the Scottish Church 1225-1559,
  - 1.4. 'Liber Officialis Sancti Andree'.
- 2. Age of marriage post 1560.

3. Parricide.
  4. Incest: digest of cases where relationship of affinity contracted by intercourse alone, 1625 to 1729.
  5. Sodomy and bestiality.
  6. Offences heard by sample of Church courts 1690-1760.
-

# ABSTRACT OF THESIS.

The thesis examines the attitudes which lay behind the different laws relating to marriage and sexual offences enacted between 1560 and 1707 by the Scottish Parliament, the Privy Council and the General Assemblies of the Church of Scotland. The Canon Law as it was taught in Scotland in the 1530's is considered as it is necessary to identify both the changes between and the continuity of pre- and post-Reformation law. The particular topics included under 'marriage' are the regulations on the celebration of marriage, the penalties for irregular or clandestine marriages, the legal proofs for the existence of a marriage, and the introduction of divorce 'a vinculo' on the grounds of adultery and desertion. The sexual offences are incest, adultery, and fornication (including ante-nuptial fornication). The legislation passed by the central authorities represents the 'official' attitudes to sex and marriage but it does not necessarily reflect the attitudes of every section of society nor of actual behaviour. This material is therefore supplemented by examples derived from other published sources - kirk sessions, burgh councils, Court of Justiciary - local regulations and of the application of the law in particular cases. The evidence suggests that it is possible to outline a general moral code but that there were conflicting views on the definition of particular offences and the appropriate penalties. The thesis confirms the importance of undisputed paternity and the system of inheritance in discussing attitudes to sex and marriage, and shows that 'moral' legislation was as much a product of political events as other Acts of Parliament.

## INTRODUCTION

The examination of the evidence on the attitudes of the Church and State to sex and marriage in Scotland between 1560 and 1707 does not start until the fourth chapter of this thesis. The preceding chapters are introductions dealing respectively with the history of Scotland during this period, the household in pre-industrial societies of Western Europe, and the Canon law of pre-Reformation Scotland.

The thesis is primarily an exercise in historical sociology and it is possible that some readers are not familiar with Scottish history. This probably includes historians as well as sociologists if they, like the author, learned about Scottish events only where these impinged on English political history. It is therefore felt appropriate to include a short account of the major political changes in Scotland between 1542 and 1712 so that readers might have a framework within which to place the more specific events discussed in the subsequent chapters. This first chapter also introduces the reader to the names of most of the institutions whose records provide material for the remainder of the thesis.

The second chapter on the sociological background describes the kind of household structure which the author assumes to have been the context for the attitudes to sex and marriage. This is particularly important as the maintenance of the family and the co-residential group is often the justification or explanation for the attitudes to sexual deviance and marriage. The method adopted is a description of some of the solutions used to adjust the household to the demographic crises which could occur during its life cycle. It is also argued that this description can be applied to non-farming households despite the fact that the assumptions are largely derived from studies of peasant or

farming communities. This is important as in the subsequent chapters the 'local' sources used are often the records of councils and kirk sessions of Scottish burghs. Mention is also made of servants - possibly the largest group of unmarried and sexually mature people in society.

The third chapter discusses the pre-Reformation Canon Law and is based principally on William Hay's Lectures on Marriage' given at St Andrews' University in the 1530's and the 'Statutes' of the Church Councils of the Province of Scotland. This information is necessary to assess the extent to which the Reformers were innovators. It will also become clear later on in the thesis that several aspects of the legislation passed by Parliament and the General Assembly can only be understood within the context of Canon Law. One of the main features of this study is that some of the concepts and principles of Canon Law remained of continuing importance in defining the attitudes to sex and marriage.



## 1. HISTORICAL BACKGROUND.

1560 is the traditional date for the Scottish Reformation. It is a useful dividing line, but like most chronological milestones chosen by historians, its significance can be exaggerated. The events which culminated in that year developed during the previous twenty years. When James V died in December 1542, three weeks after the Scottish defeat at Solway Moss, a minor acceded to the throne. Those Scottish nobles who had been in exile in England returned and staged a pro-English coup which made Arran Lord Governor of Scotland. Their short triumph was marked by Parliament allowing the Bible in English, and by the Treaty of Greenwich which made peace with England and proposed the marriage of Mary Queen of Scots with Prince Edward of England. The Treaty symbolises the emergence of a Protestant, pro-English party. Within a year the Queen Mother, Mary of Guise, had ousted Arran and reaffirmed the alliance with France. English armies campaigned in Scotland each summer for the next few years, culminating in the Battle of Pinkie Cleugh in September 1547 and the occupation of Haddington in March the following year. Mary of Guise managed to assert increasing control over the fractious nobility competing for the power and spoil of the Crown and in 1554 Parliament formally conferred on her the Regency. However, it was French aid and continental politics that led to an English withdrawal from Scotland. It was under such uncertain political circumstances that the Provincial Council of the Scottish Church met in 1549 and 1552. French dominance of Scotland was further extended by the marriage of Mary Queen of Scots, who had been at the French court for the last ten years, with Francis II on 24 April 1558.

The Provincial Council met again in 1559 and passed another series of ineffective statutes to reform the Scottish Church. One of its

measures was the adoption of the 'Catechism' attributed to Archbishop Hamilton. But it was not enough. Already the 'Beggar's Summons' had been pinned to the doors of Scottish friaries and anti-French feeling was being used to further the cause of Protestantism. The Reformers had been organising congregations in burghs over the last few years, and it was in one of these burghs, Perth, that there occurred an iconoclastic riot on 11 May 1559 after a sermon preached by Knox. The Lords of the Congregation defied Mary of Guise's authority when she ordered government troops to muster at Stirling before marching on Perth. The rebels suspended her from the Regency in October and in the following February concluded the Treaty of Berwick with the Lord Lieutenant of North of England. The English blockade of Leith was decisive in preventing French aid from reaching Mary who was besieged in Edinburgh. The death of Mary of Guise on 11 June 1560 opened the way for the signing of the Treaty of Edinburgh between the three countries.

The Reformers had managed to come out on the winning side in the political turmoil by allying Protestantism with anti-French and anti-clerical feeling. When the 'Reformation Parliament' met in August, it abolished Papal jurisdiction in Scotland and condemned the Mass. A convention of representatives of the Reformed congregations met in December and approved on 27 January 1561 the first 'Book of Discipline'. This convention was later to be known as the first General Assembly. The Protestants' freedom of action, however, was soon curtailed by the return of Mary Queen of Scots in August 1561 after 13 years in France. She replaced the leaders of the provisional government, Châtelherault and his son Arran, by Moray and Maitland of Lethington. Her position was precarious: she continued to attend Mass and refused to ratify the

Acts of Parliament of August 1560, but she could not afford to alienate the new Church of Scotland. With considerable political skill Mary managed to maintain some sort of balance for several years, though on occasion this meant appeasing the Reformers. For instance, in 1563 statutory recognition was implied in the Acts of Parliament providing that ministers should have the use of manse and glebe and that Churches should be repaired. It was her second and third marriages that led to the revolution of 1567.

On 29 July 1565 Mary married Darnley according to the Roman rite. This occasioned a short-lived rebellion known as the Chaseabout Raid, led by Moray and Châtelherault. Both were motivated by personal reasons - the marriage threatened Moray's personal ascendancy, and Darnley was the heir of Lennox, the rival house to Hamilton. Mary also survived the Riccio plot of 9 March 1566 which aimed to elevate Darnley to full kingship. These conspiracies ensured that the Queen took care to prepare the ground for her marriage with Bothwell which required the annulment of both their marriages. In October and December 1566 large amounts of money were gifted to the Church and to burgh councils. The murder of Darnley at Kirk o'Fields on 10 February 1567 made her efforts even more imperative, especially as she was already pregnant by Bothwell. On 19 April Parliament passed an Act rescinding legislation contrary to the Reformed religion, and ratified gifts to Lethington, Morton, Moray, Huntly and Lord Robert Stewart. Five days later Bothwell abducted Mary, and they were married on 15 May. There was no way that the General Assembly could condone the marriage: Bothwell was guilty of adultery and rapt, and had married his paramour. The marriage scandalised even her supporters, and she was forced to surrender when faced with a confederacy of nobles at Carberry Hill.

Mary was imprisoned and constrained to abdicate in favour of her son on 24 July. She escaped from Lochleven Castle ten months later, but was defeated at Langside on 13 May 1568, despite considerable support, and crossed into England three days later.

The revolution of 1567 was the only occasion when a reigning monarch was deposed in favour of the heir. James VI was thirteen months old when he was crowned at Stirling, and Moray was appointed Regent. The support of the Church was even more important for the government than it had been for Mary as at least her claim to rule was legitimate. The first Parliament of the new reign re-enacted the legislation of the 1560's and established the Church of Scotland. The following years saw a succession of Regents - Moray, Lennox, Mar - and it was not until 1573 that the Queen's party was finally defeated. Morton emerged as the most adept at maintaining his position and was Regent from 1573 until his execution in 1581 (except for a brief period in 1578). The ultra-Protestant faction ruled for a short period after the Ruthven Raid which separated James from his favourite Lennox (Esmé Stewart). James then relied on James Stewart, Earl of Arran, and it was under his regime that the Church of Scotland was placed firmly under the control of the State by the 'Black Acts' of 1584. This period of rule by the ultra-Protestant or conservative factions of the nobility was gradually brought to an end by the increasing personal influence of James VI. In June 1587 he attained the age of 21, four months after his mother was executed at Fotheringhay.

The Church of Scotland did not exert the same influence over the State as it had in 1567 until 1649 and 1690. Its failure to benefit from the power struggles of the 1570's and 1580's is partly explained by internal dissension over the system of church government. The Church of the 1560's held to two main ideas: the ministry of the Gospel at

parish level, and participation by the laity. This was reflected in the early General Assemblies which appear to have been modelled on the estates in Parliament. There were commissioners from burghs and parishes, and 'godly' noblemen attended as individuals. Ministers attended because the business concerned them personally, or they had been instructed by their superintendent, or as burgh representatives. The General Assembly was a small body (37 in 1562, and 62 in 1572), predominantly drawn from south of the Tay - as late as 1590 only 21 of the 166 people who attended came from the north. Sometimes there were more laymen than ministers. The early Assemblies represented the control of the Christian community over the Church, and were a temporary substitute for the 'godly prince'. The Church consisted of local kirk sessions supervised by superintendents who had powers similar to those of bishops. But in 1574 Andrew Melville returned from Geneva imbued with presbyterian ideas which questioned the existing polity. He educated a new generation of ministers in these ideas through his position as Principal of the College of Glasgow and then in 1580 of St Mary's College at Aberdeen. Melville argued that the office of bishop lacked any scriptural authority and that presbyteries should be established. The Church was to be placed on a firm financial footing by being granted all former ecclesiastical property. Relationships between the State and the Church were to be on the basis of 'Two Kingdoms', which basically meant an independent Church which would instruct the civil authorities on their duties. Melville's ideas were increasingly accepted within the ministry: for instance, the second 'Book of Discipline' of 1578, and the organisation of synods in the 1580's. But the conservative elements were dominant in the State, and anti-clerical feeling was expressed in the 'Black Acts' of 1584 and the 'Negative Confession' of 1581. The mutual need for support between the

Church of Scotland and Protestant laity in the 1560's was replaced by antagonisms, and the anti-clericalism which had then been a source of support was now directed against the Reformers.

James VI was aware that royal power depended on subordinating the Church and the nobility to his will. In 1587 he revived an earlier Act of 1428 so that the representation of small barons in Parliament would counterbalance the influence of the nobles. The King developed the Lords of Articles into an effective means of controlling Parliament by making it the only avenue through which measures of a public and general character could be introduced into Parliament, and by ensuring that its members were mainly Privy Councillors. Conventions were also developed as an alternative - 17 met between 1594 and 1601. Initially James had to compromise with the Church and in 1592 Parliament recognised presbyteries and synods, and suspended the office of bishop from effective power. By 1596, however, James was strong enough to force the Presbytery and city of Edinburgh to submit to his will. His accession to the throne of England strengthened his position by giving him personal security in London away from threats such as the Gowrie Conspiracy of 1600, and by giving him a large amount of patronage with which to solicit the support of the nobility and to entice them out of Scotland. The early success of the Presbyterians was countered by the imprisonment and exile of their leaders, including Melville, in 1605 and by the gradual re-introduction of episcopacy. Bishops were formally restored in 1610, and were appointed by and responsible to the Crown. They were used to further royal control over the Committee of Articles, Parliament, the General Assembly and Synods (in which they sat as moderators). Some measure of James' success can be gained from the fact that the General Assemblies of 1606, 1608, 1616, 1617, and 1618 were later repudiated by the Church as having no ecclesiastical

authority. After the latter Assembly accepted the Five Articles, James dispensed with <sup>Assemblies</sup> ~~the~~ and it was not until 1638 that the General Assembly met again. There is much evidence to support the claim made by James VI in 1607 that in London "I sit and govern with my pen, I write and it is done, and by a clerk of the council I govern Scotland now, which others could not do by the sword".

Charles I acceded to the thrones of Scotland and England in 1625. The change in monarch at first made little difference to the way Scotland was governed. The Jacobean compromise of combining bishops and presbyteries worked well, and the kirk sessions, which still retained lay representatives, operated more effectively than before. But Charles lacked his father's political astuteness, his ability to compromise when necessary, and his knowledge and grasp of Scottish affairs. This was shown plainly by one of his first measures - the Act of Revocation - annulling all gifts made since 1540 of the properties which the crown could claim. This included much former ecclesiastical revenue which the nobility and many lesser lairds regarded as rightfully theirs. The 1630's saw further measures, including heavy taxation and the Canons of 1635, which alienated many of his Scottish subjects. The crisis came in 1637 with the attempt to introduce a new Prayer Book.

The next 14 years are a confusing series of events, of which only the main changes in direction can be mentioned. The widespread opposition to Charles I as expressed in the National Covenant of February 1638 became increasingly fragmented as the extremists outmanoeuvred royalists and moderate covenanters. This was paralleled by a decline in the effectiveness of rule from Edinburgh until the conquest of Scotland in the 1650's by Cromwell imposed an unprecedented degree of

law and order. Power was increasingly won by the Presbyterians, those people who had not accepted the restoration of episcopacy by James VI. They already had sufficient influence to abolish episcopal government at the General Assembly of 1638, largely through the leadership of lay covenanters like Rothes and Loudoun. Parliament did not meet until after the first Bishop's War in 1639 which revealed the weak position of the King and forced him to approve the abolition of episcopacy. The 'Pacification' was short-lived and further military operations followed in 1640 known as the 'Second Bishop's War'. When Charles I made his second visit to Scotland in 1641 he was forced again to give way to all the demands made on him. This included, for instance, the replacement of most Royalists on the Privy Council by covenanters. The English Civil War started the following year but it was not until September 1643 that Parliament entered into the Solemn League and Covenant with the English Parliament by which it was agreed to impose presbyterianism on England and Ireland in return for Scottish military aid. The proposals for religious conformity were drafted by the Westminster Assembly and later approved by the Scottish Parliament and General Assembly. By the end of 1645 Charles I was militarily defeated - in England at Marston Moor (2 July 1644) and Naseby (14 June 1645), and in Scotland the Royalist Montrose was defeated by Leslie at Philiphaugh (13 September 1645). In May 1646 Charles I surrendered to the Scots who handed him over the following January to the English Parliament. Increasing doubts about the King's future and of presbyterianism in England led the more moderate covenanters to seek a compromise with Charles. The Treaty of Carisbrooke was signed by the King on 26 December 1647 and made public by Loudoun and Lauderdale on 25 February. It was agreed in the Engagement that the King would be restored on condition



that he would reaffirm presbyterianism in Scotland and allow it a three years' trial in England. There was a substantial majority, particularly among the nobles, in the new Parliament of March 1648 in favour of Hamilton and the Engagement. The subsequent invasion of England, however, ended in the defeat at Preston in August and the remaining Engagers surrendered in Scotland in the same month after the Whiggamore Raid. A purge had already started against the Engagers in fulfilment of an undertaking to Cromwell before Parliament passed the Act of Classes in January 1649. Seven days later, 30 January, Charles I was executed in London. The purge included the army, Parliament, the General Assembly, and ministers. Although leadership was in the hands of Argyll and a few nobles, it was the covenanting ministers who were dominant. Only 16 nobles sat in the Parliament of January 1649, compared to 56 in March 1648. This was the golden age for extreme presbyterians but according to Kirkton

"All the purging and punishing simply made the regime increasingly unpopular without making the kingdom noticeably more godly". 1

Further divisions occurred over the attitude to the monarchy - Charles II had been proclaimed King of Scotland in February. After lengthy negotiations Charles took the Covenants on 23 June 1650 before landing in Scotland. An army was raised under the command of Leslie, but it was defeated by Cromwell at Dunbar on 3 September 1650. Charles was crowned at Scone on 1 January 1651. Efforts were made to revitalise the army by appointing royalists and engagers as officers. Those who favoured this were known as 'Resolutioners' and those opposed as 'Protestors', and later as 'Remonstrants'. The Act of Classes was

Quoted in  
1. Stevenson, 'The Covenanters'; 655.

rescinded by Parliament in June 1651. But it was too late - Charles II was defeated at Worcester on 3 September, Monck had taken Stirling in August and by the end of 1652 he had subjugated the whole of Scotland. The General Assemblies of July 1653 and July 1654 were broken up by English soldiers. The last unsuccessful attempt at resistance was the Royalist rebellion of 1653-4 led by Middleton.

The events of the 1640's revitalised Parliament and the General Assembly, and they played an unprecedented role in governing Scotland. In contrast the Privy Council met only occasionally after 1643, and then only to consider minor matters because its members favoured the King more than the covenanters. The influence of the kirk party was dependent on support among the laity, as in 1560 and 1567. Ministers were only dominant in 1649 and as the events of 1650 showed the kirk party was ineffectual without the support of laymen. The means of their success was through committees, whose membership was biased in their favour and which prepared and controlled the business presented to Parliament and the General Assembly. The Committee of Estates and the Commission of the General Assembly each in their own way performed some of the functions of the Privy Council and the Lords of Articles. Relationships between the two were not always harmonious as the clergy in attendance at the Commission were usually two or three times the number of lay members and represented the more extreme elements of the kirk party.

The Restoration of Charles II in 1660 represented an attempt to return to the situation as it was before the 1640's. The first Restoration Parliament passed a Rescissory Act which annulled all legislation after 1633, though some of the Acts of 1640 were re-introduced. The Committee of Articles was restored and a return was made to the previous method of election - the bishops chose 8 noblemen,

who in turn chose 8 bishops, and these 16 elected 8 barons and 8 burgesses. Usually the membership corresponded closely to that of the Privy Council. The Committee was again used by the King to dominate Parliament. It was claimed in a document issued in 1663 to Sir Robert Moray for presentation to the King that

"nothing can come to the Parliament but through the articles and nothing can pass in articles but what is warranted by his Majestie so that the king is absolute master in Parliament both of the negative and affirmative". 1

This is partly flattery as Conventions were called instead of Parliaments in 1665, 1667 and 1678 for granting taxation. There were also some occasions of opposition in Parliament to government measures: for instance, in 1661 on choosing the Articles and in 1673 when opposition to Lauderdale, led by Hamilton, resulted in an adjournment until 1681. Although Parliament may not have been a rubber stamp, its debates had little effect on legislation. Scotland returned to the system of ministerial government - real authority lay with ministers of the Crown who governed through the Privy Council dominated successively by Middleton, Rothes and Lauderdale. Unlike the reign of Charles I, however, few bishops sat on the Privy Council - until 1683 there was only Sharp and Burnet - although bishops did continue to hold important offices and also took an active part in Parliament.

The settlement of the Church was also characterised by a return to the Jacobean compromise. Episcopacy was restored, and integrated within the presbyterian structure of kirk sessions, presbyteries and synods. The General Assembly did not meet, although an Act was passed in 1663 establishing a National Synod which would have had similar

1. Lauderdale Papers'; I, 173-174.

functions. Drafts were also prepared for a new Book of Common Prayer and Book of Canons. It does appear that a thorough settlement of the Church was intended but never attempted. The compromise seems to have provided effective Church government. Legislative power and appellate jurisdiction lay with the bishop in synod, and executive authority was shared between the bishop and the presbytery. Synods were invariably presided over by bishops, and they appointed the permanent moderators of presbyteries. One of the few changes was the exclusion of lay elders from presbyteries.

But the Restoration settlement was not universally accepted. Probably between 250 and 300 ministers out of a total of 900 refused to conform and were ejected from their livings, just as some episcop-  
alians had been outed in the 1640's. Sympathy for the covenanters was sufficient in Ayrshire, Dumfriesshire, Galloway, the central Borders, and in parts of Fife and Easter Ross for excluded ministers to run an alternative Church which met in open air Conventicles. Initially the government tried to enforce conformity by using Parliament and the Privy Council. In August 1663 the Mile Act was passed, and the Court of High Commission was revived. The action of the army under Sir James Turner in suppressing covenanters led in 1666 to the Pentland rising in the south west which ended in the defeat of the covenanters at Rullion Green. This was followed by an attempt at conciliation - a large part of the army was disbanded in August 1667 and the first Indulgence was issued in June 1669. About 40 ministers, mainly in the diocese of Glasgow, accepted the first Indulgence and approximately another 45 accepted the second Indulgence of September 1672. The government did, however, strengthen its powers against those who refused to be accommodated: for instance, the Act of Supremacy and the Act  
anent Conventicles. The later 1670's were marked by renewed repression

the quartering of the Highland Host on the south-west in 1678 and the defeat at Bothwell Brig in June 1679 of a second rising. Sir George MacKenzie of Rosehaugh as Lord Advocate (appointed 1677) conducted vigorously the prosecution of covenanters in the criminal courts. The Archbishop of St Andrews, James Sharp, was assassinated by covenanters in May 1679. The third indulgence in the same year saw many non-conformists acquiesce or submit, and by 1680 only a few radical movements were left. The Cameronians in particular persisted in active opposition despite the loss of their leaders - Cameron was killed in a skirmish in 1680, and Cargill and Renwick were executed in 1681 and 1688 respectively. The second Indulgence of James VII allowed presbyterians to worship in public, and was accepted by almost all non-conformists except for the Cameronians. The government always regarded non-conformity as treasonable and seditious, and this is partly substantiated by Carstares' plots against Charles II and James VII which involved the use of Dutch arms and money.

The accession of James VII in 1685 completely changed the political and religious situation. He lacked the subtlety and deviousness to overcome the handicap of being a Roman Catholic monarch of a nation which had experienced anti-Papist propaganda for nearly 150 years. James almost immediately alienated many Scots by proposing toleration for all Christians including Catholics. The Parliament of 1686 rejected the Act - the barons, burgesses and bishops united in opposition. This was the first Parliamentary victory over a strong monarch. The situation was exacerbated by James' moves towards arbitrary government; for instance, he assumed by royal letter the power to nominate provosts and town councils. James' position deteriorated, particularly in England, and eventually he fled to France in December 1688, the month after William Prince of Orange landed in Devon. Though Viscount Dundee raised

the clans and advanced as far as Dunkeld after winning the battle of Killiecrankie, James had little chance of returning to power once he had left England.

The Convention of Estates of 1689 decided after the bishops had withdrawn that James had abdicated and that William should be asked to be King. It was by no means certain that the new settlement would establish presbyterianism. The Parliament of 1689 only abolished prelacy, and it was not until the following year that presbyterianism was established and approval was given to the Westminster Confession. This was largely a political decision, urged by Carstares, because the bishops refused to recognise William as king 'de iure'. Relationships between king and kirk were uneasy: the General Assemblies of the early 1690's included a hard core of about 60 'antediluvians' (ministers ejected at the Restoration), comprising about a third of the total members, nearly all of whom came from south of the Tay. Both the Assemblies of 1691 and 1693 were adjourned before they met, and that of 1692 only sat for a month and its acts were never printed. The differences were particularly acute over the accommodation of Episcopal clergy - about a 100 were rabbled in the south-west- and the terms of the oath of allegiance to be taken by all ministers. A compromise was not reached until 1694, but resentment and distrust remained on both sides and the uneasy relationship was maintained because of the need of each for the other. William had difficulty managing Parliament as well: that of 1689 was prorogued because of a dispute over the Committee of Articles. Its abolition the following year allowed the House to control the business which came before it, and to develop forms of debate. It had become usual by the session of 1695 for overtures or drafts 'to lie on the table' so that members might consider them, and in 1696 it was enacted that no law could pass at the first reading.

Parliament required much greater skill in managing because some members were prepared to make the most of the government's difficulties. The Massacre of Glencoe was used against Stair, Secretary of State, in the sessions of 1693 and 1695, and much was made of the King's attitude to the Darien scheme in 1698. By 1700 Parliament was combining together the granting of supply with the redress of grievances, for instance, restitution for the Darien losses. The government, however, successfully controlled Parliament and the King retained the right of veto, and perhaps the right to change details of bills, as royal assent was required before any Acts became law.

The relationship between monarch, Parliament and General Assembly was not any easier after Anne became Queen in 1702. In fact in the years immediately before the Union the Scottish Parliament showed increasing independence: for instance, in 1704 the Act of Security refused to accept the Hanoverian succession and the Act anent Peace and War asserted the right of making peace and war. There had been previous discussions on Parliamentary union between the two kingdoms - 1604 to 1607, 1688 to 1670 - and Cromwell had imposed unity for a few years. Under the Act of 1707 Scotland had 16 seats out of 206 in the House of Lords, and 45 among the 568 in the House of Commons in the 'new' British Parliament. The treaty guaranteed the continued separate existence of the Scottish law courts and the Church of Scotland. The date marks a convenient end to this thesis as two of the main sources cease: the last meeting of the Scottish Parliament was on 28 April 1707 and on 1 May 1708 the Scottish Privy Council was abolished. The third, the General Assembly, continued but the British Parliament did alter the religious settlement of the 1690's despite the safeguards in the Act of Union. By the Act of Toleration of 1711 Episcopal clergy were allowed to hold services, and perform the sacraments without interference.

The Act also withdrew civil penalties from excommunication but did ratify all existing Acts against immorality and profanity. In addition the Patronage Act of 1712 further altered the settlement by reasserting the rights of lay patrons to appoint ministers to parishes.

Throughout the period of 1560 to 1707 the institutions of Scotland were adapted and changed. The Parliament and General Assembly of 1707 were very different from those that had met in 1560. Other changes also took place, the most important perhaps being the <sup>increased</sup> ability of the government in Edinburgh to rule the whole of Scotland and not just the Lowlands, and to impose law and order. The legal structure was developed particularly in the late seventeenth century - the Court of Justiciary was created in 1672, the Advocate's Library was founded in 1682, and in 1681 appeared the first edition of Stair's 'The Institutions of the Law of Scotland'. Disputes were far more likely to be settled by expensive and lengthy law suits than the rough justice of feuds and raids. Perhaps the most effective and least changeable institution throughout the period was the kirk session. No matter whether the Church of Scotland was episcopalian or presbyterian, the sessions continued in their work of trying to reform the behaviour of their congregations. Their persistence may have made a greater contribution to law and order than any Act of Parliament. Throughout the thesis, it must be remembered that an act, whether passed by Parliament, Privy Council or General Assembly, was basically a declaration of intent and principle, and may not have been enforced or compatible with actual behaviour. Rules and regulations are a guide to attitudes - behaviour is likely to be different as the reinforcement of a rule by penalties implies that people are breaking it. The enactments are declarations of what behaviour should be, not what it is.



## 2. THE SOCIOLOGY OF THE TRADITIONAL HOUSEHOLD

### 2.1. Introduction

A study of attitudes to sex and marriage in pre-industrial Western European societies requires some understanding of their social structure. There is, however, a lack of research on household composition in Scotland in the sixteenth and seventeenth centuries. This may reflect a dearth of data, although a cursory examination of material in the Scottish Record Office and the National Library of Scotland does reveal extant listings, some of which are very detailed. Most of these date from the late eighteenth and early nineteenth centuries with only a very few from before 1700. However, much research has been carried out in the last ten years on household structure in England, New England, Germany, Austria, etc. The work of Laslett, Greven, Berkner, Knodel and others probably shows sufficient similarities between different areas and periods for a hypothetical pre-industrial Western European familial household system to be described in the same way as Hajnal has described a European marriage pattern. This section of the thesis is such a description. Scottish examples are cited but these are only illustrations and are not proof that this descriptive analysis is applicable to Scotland.

Most of the existing research is based on analysing the behaviour of farmers, ie people who derived their livelihood from agriculture and who had the power to dispose of their land even if they did not own it outright. Rarely did these farming households comprise the whole community - there were the households of labourers, tradesmen and craftsmen - and there were wide variations in the proportion which they made up of all households. The hypothetical system described below

is intended to comprehend these non-farming households and this requires justification.

The proportion of farming households in itself may not be very significant. A majority of the people in the community may have lived in farming households, either at a single point in time or during part of individual life-cycles, even when such households were in a minority. For instance, in the North-East of Scotland in the nineteenth century the number of permanently landless labourers was small compared to those who were mostly born into households with some land, served on farms, and then worked for a period as outdoor labourers before finally taking a croft for the last part of their working life. 1 Secondly very few people were not involved in the exploitation and acquisition of land. Merchants and craftsmen were probably not discrete from the larger community of land-owners. The majority of Scottish burghs were small, and trades were often supplemented by farming. This occurred in other countries too, for instance, in County Clare craftsmen relied equally for their livelihoods on small-holdings. In most of these communities there was a movement of people between farming and other occupations, particularly through apprenticeship and marriage. 2

This intermixing of occupations probably means that the attitudes to the household as reflected in farming households permeated all parts of society. The same kind of household was used to exploit different sources of livelihood.

The third justification is that an important and common characteristic was the ability to acquire and dispose of property. Farm land

1. Gray. 'N.E. Agriculture'; 101.

2. Arensberg and Kimball. 'Family and community'; 246, 343, 345, 366. Smout. 'History'; 159.

is only an example - others are shops, capital for trading ventures, skills, etc - in fact anything which can be passed from one generation to another that could provide a source of livelihood or a start in life. At the most mundane level this may be just a few pots and pans, and a cow. The household was the primary unit of economic exploitation, and the common problem was how to provide for your children's future well-being. The customs and laws relating to the different systems of inheritance varied, but all were intended to safeguard the future of the surviving spouse and offspring. Inheritance was one of the main methods of transferring property between generations (father to son) and within generations (brother to brother). The pre-industrial societies of Western Europe had systems of inheritance which preferred male heirs to female heirs, though not necessarily the eldest son (eg borough English inheritance). This meant that paternity was of great social importance as the rights of inheritance were usually devolved through the father. This probably applied irrespective of the economic basis of the household, and implies similarities in the structure and formation of households where there was property to inherit.

## 2.2. Crises in the life-cycle of the household

The main advantage of using the life cycle as a paradigm is that it is dynamic and it emphasises the structural flexibility of the system. The first phase of the life-cycle started with the basic dyadic relationship of husband and wife to which was added their family of procreation. During this expansionist stage the children were economically, legally and emotionally dependent on their parents. The second phase was the dispersion of the children who joined other households or formed their own. The final phase was the replacement of the family founded by the parents with the subsequent families established by their

offspring, particularly that of the heir. These three stages were not discrete in time and could overlap. 1

The cycle has to adapt to certain problems which can occur: the main demographic crises were probably old age, death of a spouse, orphas<sup>n</sup>, and the lack of a son. The following discussion is based on the assumption that there were conventional ways of minimising the potential disruption to the household and community. There may have been a choice of several alternative methods, depending on the resources available to a particular domestic group. Thus there could be conventional solutions and non-conventional (or non-ideal) acceptable solutions. The discussion will show that lateral extension of the household, and the inclusion of kin other than parents and children were probably responses to crises and not a fundamental part of the ideal life-cycle.

#### a. The crisis of old age.

A surprising proportion of the population possibly did survive into old age (ie over 60/65 years old). This was partly a reflection of age differentials in mortality: though life expectancy at birth was probably under 50 years, it was much increased after the age of 10 because of the high level of mortality among infants, (eg Laslett 'Family life and illicit love; 182, see also 186-188. 'Scottish Population history', ed M Flinn appeared too late to be included.)

As the head of the household and his wife grew older, the burden of managing the household and meeting community obligations would become increasingly onerous. Eventually through senility or infirmity someone else would need to take over the day-to-day management, especially

1. Fortes. 'Introduction'; 4-5.

where this involved physical work out of doors. The old couple would still require a source of income, preferably sufficient to maintain themselves at their accustomed level, and possibly might require assistance within the house. The problem was who would be willing to help them and why. The main bargaining counter the couple had was their power to dispose of their property as they wished within the confines of law and custom.

The conventional solution was for the heir, or prospective heir, to fulfill certain obligations in return for most of his parents' property, particularly the land and the paternal home. His acquisition of the legal title to the land usually occurred either at his parents' formal retirement, or on the death of his father. Sometimes it was associated with the heir's marriage. An example of the latter is the obligation of Katherine Kincaid, widow of Adam Vachop in Nether Carlowry, in October 1573 whereby on the narrative that Thomas Vachop, her son, and Cristiane Davidsoun, his future spouse, had agreed to sustain her during her lifetime in lodging, meat, drink, and clothing suitable to her estate and honour, without payment, and that either in their own household or otherwise at her pleasure, she constituted and ordained them her cessioners and assignees in and to the steading of Nether Carlowry. 1

Household composition was likely to be least complicated where the heir's acquisition of the legal title was delayed until his marriage and the death of both parents. This late timing may partly explain Laslett's argument that the aged were ordinarily left in charge of the family groups they themselves had brought into being, and that most had

1. 'Prot.Bk.Grote'; 88, no 352.

living with them unmarried children. 1

The effect on the household, however, could be very different, particularly in generational depth and lateral extension, according to the timing of the changeover, its association with marriage of the heir, and the residential relationships. 2

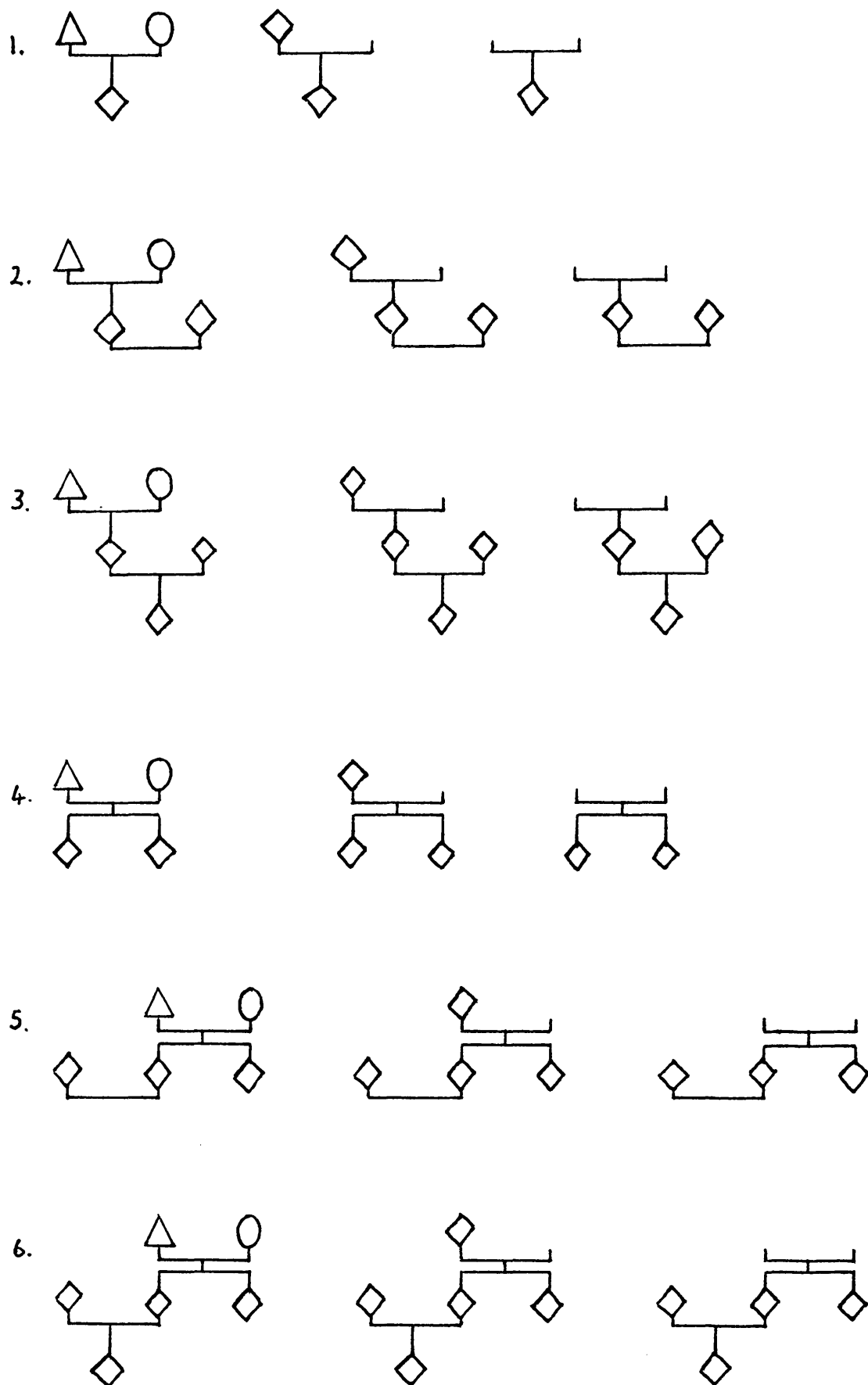
Figure 1 illustrates the differences in co-residential pattern (household and/or houseful) which could arise with variations in the timing of the heir's marriage and dispersal of his siblings. The heir or his parents may be head of the same household, or of two different households.

There were two further solutions which can probably be described as non-conventional acceptable solutions. Usually the heir and his parents co-resided, but this was not always the case. Where the property included several residences either of the parties might move out of the paternal home and maintain a separate residence. This might have been common where it was comparatively easy to establish a new residence - eg in parts of New England - or among the nobility where the inheritance might include several separate estates in different parts of the country. The cost of the parents' separate residence was sometimes borne by the heir. For instance, in 1564 James Auld transferred some

Laslett. 'Family life and illicit love'; 199-200, 208-211.  
See also: Homans. 'Eng. Villagers'; 146, 149, 152, 154, 214.  
James. 'Family, Lineage, and Civil Society'; 20.  
Howell. 'Peasant inheritance'; 145.

Berkner. 'The Stem Family'; 405 and 401.  
Arensberg and Kimball. 'Family and Community'; 111, 379  
Greven. 'Four Generations'; 91, 95, 134, 137.  
Drake. 'Population and Society'; 110.

Figure 1.



land to his son who in return agreed to pay his father 115 merkes and a further sum of 40 shillings yearly for the rest of his father's life. 1

A similar kind of arrangement was included as a proviso in some transfers in case the two parties could not live harmoniously under the same roof. This seems to be the explanation of an agreement in 1562 whereby

"the said Johnne Cass and Margaret Marche, his spouse, should receive and 'tak hame' the said Alexander (Cass) and Janet (Dowglass), and sustain them in meat, drink and clothing, and bedding, so long as they chose to remain, and should they not agree, they were to deliver to them  $1\frac{1}{2}$  oxengang of land with 'ane onset', of the lands of Mouktounhall and plenish it with corn, cattle, etc." 2

The second non-conventional solution was where two or more siblings remained to work the farm and to look after the elderly couple. Lateral extension was probably most likely to occur where the heir succeeded to the property before all siblings had left the parental home. Lateral extension was probably most common where partible inheritance was the custom: it may not have been possible for one of the siblings to buy his brother's and sister's shares, or the subdivision of the property might not have been practicable as each share was insufficient for each to live separately. Difficulties like these were probably the background to the decision by arbiters in 1541 that

"the said William shall pay to each of his said brothers and sister the sum of 20 merks Scots, and their bairns part of gear; he shall receive Richard Burne his brother 'till hous and herbery, met and claith, and

1. 'Prot.Bk.Johnsoun'; 140, no. 695

2. 'Prot.Bk.Grote'; 50, no.218.

See also: 'Prot.Bk.Corbet'; 22, no.91.

Berkner. 'The stermfamily; 405.

Williams. 'Gosforth'; 52.



honest sustentatioun, he doand service therefore that he may do, and gif it sal happin the said Rechart his bruither to tyir or irk of the said William and thinks he ma do better, in that cais it salbe lesum to the said Rechart to pass and remane quhar he thinks best, and the said William sal content and pay him 20 merks usuale money of Scotland". 1

The last alternative might have been charity. This was possibly the least acceptable solution but might have been necessary when the family failed or was unable to support its elderly members. The elderly might be institutionalised, lodged in other households at the expense of the community, or given poor relief to support them in their existing accommodation. Usually offspring had the resources to maintain their aged parents if they so wished because their parents had transferred <sup>property</sup> to them. But there were probably occasions when the children only had sufficient to support themselves and their families and they could not afford to divert resources to the support of their parents. In such cases the community perhaps took over responsibility. There is, however, no positive evidence to support this suggestion for the period covered by this thesis.

#### b. The death of a spouse

The age of the surviving spouse and the age of any resident off-spring were probably the critical factors in determining the solution to this crisis. The older the spouse or the prospective heir, the more closely was the solution likely to be that appropriate for old age. Sometimes the death, particularly of the father, initiated the transfer of the property to the heir who then became the head of the household. The widow or widower was often allocated house space or maintained in a separate residence. In England unlike in Andover or in Plymouth in New England,

1. 'Prot.Bk.Johnsoun'; 49-50, no.248.

it appears to have been more common for the surviving spouse to remain as head of the household and there was usually no rearrangement of generational household relationships. 1

If the widow inherited instead of the children it was often only a life-interest which she lost if she remarried or which could not be transferred to her own heirs. 2

Sometimes a similar restriction on the widower was included in the transfer to the heir. For instance, John Fenesoun of Carpow in Perth agreed in 1551 that he

"shall put the said Hew, his sone, efter him in this takkis and steddingis that he hes of Carpow and Pitgrugny and Feresfield, and sal sustene in his houshald the said Hew and Janet honestly as effeiris to thair stait for the said Jhonis liftim", and further obliged himself not to marry for the lifetime of Hew and Jonet". 3

The increase in the proportion of persons widowed the older the age set probably reflects less remarriage as well as demographic factors.

Men probably also tended to remarry more than women. 4

Dupaquier and Jadin's research on Corsica 1769-1771 demonstrates the effect this could have on household structure: the number of households headed by widowers and widows rose as the age of the head increased, as did the number of households with married offspring. 5

1. Laslett. 'Family life and illicit love'; 199.  
Greven 'Four Generations; 84, 95, 137.  
Demos. 'Little Commonwealth; 75  
See also: Williams 'West Country Village'; 95
2. eg. Homans. 'Eng.villagers'; 193-194.  
Drake. 'Population and society'; 136.
3. 'Prot.Bk.Gaw'; 20, no.87.
4. Laslett. 'Family life and illicit love'; 26-27.  
Knodel. 'Bavarian village'; 364.
5. Laslett and Wall. 'Household and family'; 294.

The correlation between the age of the surviving spouse and the probability of remarriage recalls the attitude in County Clare where a person who already had children was censured for remarrying as manifesting sexual aspirations not expected from one of that age. This sometimes resulted in overt punitive action, particularly where the heirs' expectations were threatened by the taking of a young woman as a wife. 1

Remarriage was, however, a common solution to the death of a spouse where the survivor was below 50. Usually this would have meant that they had residing with them offspring under the age of 10. One of the reasons for remarriage was the functional necessity - the death of a spouse was a crisis in the household which was readily solved by remarriage. The sexual division of labour meant that the widower was unlikely to take over his deceased wife's responsibilities, particularly where there were young children. A female servant or female relative was a possible substitute, though the ambivalent role as a potential 'de facto' wife might have led to gossip. A grandmother or elderly aunt, however, may have been immune from such sexual suspicion. Widows seemed to have been more likely to assume the husband's responsibilities, particularly in trades, except where it involved heavy outdoor work with specific male skills, as on most farms, or when the heir was of an age to inherit and/or marry.

The age distribution of remarriage and the increase of widowhood with age appears to argue against remarriage for companionship as suggested by Laslett, or its failure to prevent a solitary old age. 2

It was much rarer for people to marry more than twice and it may not be appropriate to describe traditional remarriage as serial monogamy. 3

1. Arensberg and Kimball. 'Family and community'; 212, 374, 381.

2. Laslett. 'Family life and illicit love'; 208.

3. Knodel. 'Bavarian village'; 364.

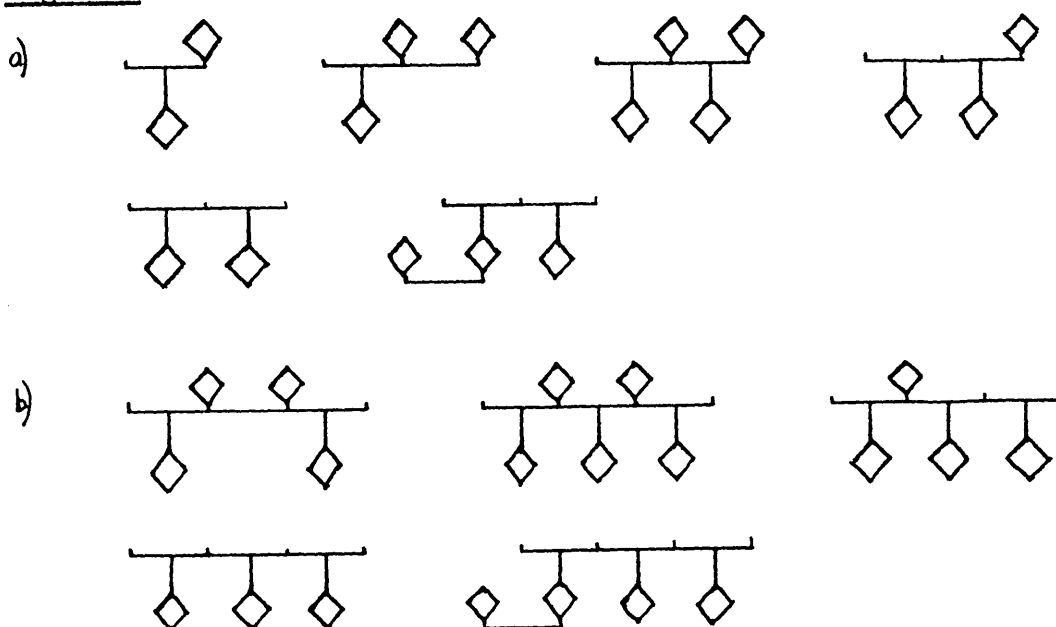
Laslett. 'Family life and illicit love'; 58, 208.

Greven. 'Four generations'; 29, 111.

Demos. 'Little Commonwealth'; 194.

The main disadvantage of remarriage was that the heirs of the first marriage might receive a less favourable inheritance because of step-children, both those of the in-marrying spouse and those of the second marriage. The restriction of the widow's interest to a life-interest was one safeguard. Another was the principle that a year should elapse between the death of one spouse and remarriage to avoid confusion over paternity. In Scotland the widow's basic inheritance was a third of the moveable goods, and her rights of terce. It is significant that in those parts of Norway where the rights of the heirs of the first marriage were not safeguarded by the similar custom of 'åsete' - usually where the farmers were tenants - marriage between bachelors and widows were more common than where 'åsete' existed. <sup>1</sup> Some of the complications this could lead to in household and houseful structure, in addition to those in figure 1, are illustrated in figure 2.

Figure 2



1. Knodel. 'Bavarian Village'; 364-365  
 Stair. 'Institutes'; 425  
 Drake. 'Population and society'; 110, 136.

### c. Orphans.

The loss of both parents was likely to be most acute when the orphans were still of a young age - under ten, for instance. At later ages the orphans were more likely to have left the parental household already, or to be of an age when they could inherit and provide for themselves. The possibility of a sibling assuming the parental role over his co-residential brothers and sisters has already been mentioned. The dispersal of the siblings from their home was probably accelerated. Our concern here is with households where the household was broken up by the death of the parents as the children were too young to become servants and apprentices, or to manage the property themselves. Such orphans were probably few in number. 1

Probably the conventional solution was to find substitute parents from within the kin-group. The presence of nephews, nieces, and grandchildren in a household was probably partly accounted for by this. 2 Failure by the kin-group to solve the crisis would probably mean that the community had to find alternative solutions. Wardship was a formal solution which possibly provided incentives to the guardian in the form of revenue from the property until the orphan reached the age of majority, and the opportunity to influence the ward's choice of marriage partner to his own advantage. Where there was little or no property to provide an incentive, the community might provide one by an allowance to anyone who would take the child into their household. Institutionalisation was another possible solution.

1. Laslett. 'Family life and illicit love'; 166.

2. For other factors see Anderson. 'Preston in comparative perspective' in Laslett and Wall 'Household and family'; 227-228.

d. Lack of a son.

The lack of a son could occur in several ways. For instance, no male child born to a couple might survive to an age when he might inherit; or the couple might be naturally infertile. Celibacy with no illegitimate issue was another possible cause, for example, where a farm was jointly owned and run by unmarried siblings. It was a crisis because of the custom of bargaining the right to exploit land in return for the obligation to support the transferer in old age. The critical nature of the problem was reinforced in some areas, for example County Clare, by the development of a strong emotional attachment between a particular family and a particular farm. There was the ideal of family continuity, of the paternal home passing from father to son, to his son and so on. This aspect can, however, be overemphasised as in some English communities there was considerable geographical mobility and an active market in land.

The most obvious solution was the recruitment of a substitute son by the marriage of a daughter so that the in-marrying son-in-law took the place of one's own son. On some rare occasions there may have been no surviving offspring, and recourse might be made to bringing into the household a younger married brother, or his son. This followed the degrees of kinship, and therefore inheritance. It is possible that there was a feeling that those who were to benefit by an inheritance should work for it. This may be the background to a Scottish protocol of 1575. It is a contract of service between John Thomsoun in Drumcorse and his wife Margaret Johnsoun on one part, and James Ker, weaver, and his wife Janet Henderson on the other part. John Thomsoun and his wife agreed to "bind themselves to be servants for life to the said James and his wife, to live in the household with them and to hand over to them all their goods and geirs, whereby the said James and his wife bind

themselves to maintain the said John, his wife and children, in sickness and health, in meat, drink, clothing and other necessities, and on the decease of the said James and his wife the half of their goods shall come to the said John and his wife". 1

One of several possible explanations for this arrangement is that James and Janet were approaching old age and had no kin available to live with them (though presumably they did have some kin who were to receive half of the inheritance). John and Margaret possibly exchanged maintenance for themselves and their children and the promise of the other half of the inheritance in return for looking after the couple and putting all their goods into a common pool.

### 2.3 Discussion

A weakness of the paradigm of the life-cycle of the household, however, is that it does not incorporate as an integral part the place of living-in servants or lodgers. Lodgers were partly a distinct social class of landless labourers who were a potential supplement to the labour supply of all the households in the community. Most lodgers were married and often lived with a child or spouse. The occurrence of lodging may also reflect a scarcity of housing or smallholdings. It may also be related to provision for deserted spouses, or for widowed or unmarried aged who were not supported by their kin. 2

The majority of servants, however were single and young, and eventually established their own independent households: it was a stage in an individual's life-cycle rather than a permanent occupation. Servants

1. 'Prot.Bk.Johnsoun'; 176, no.913.

2. Drake. 'Population and society'; 114-115.  
Berkner. 'Stem Family'; 410-411, 416-417  
Laslett 'Family life and illicit love'; 205-206.

enabled the head of the household to withdraw partly or completely from direct labour and to direct his energies elsewhere. This may have been office-holding in the local community or at higher levels in the State.

Similarly the wife of the head of the household may have been required to spend most of her time in maintaining a social life, and her life-style might require her to perform her household duties by supervision rather than with her own hands. The wife might also require help during periods of child-bearing, or when young children were not present to perform ancillary labour in the house and farm-yard (eg butter-making, poultry). There were also variations in the size of land-holding, and not all of them could be farmed using just family labour. There may still have been a need for servants even where a farm could be worked efficiently by a family as offspring may not have always been present to provide the necessary labour. Thus in Heidenreichstein servants were more likely to be found in households headed by a young couple whose children were not yet old enough to work. 1

There were also reasons why this demand for labour could be met. There were probably households where there were more children than were actually needed for labour, and these might become servants in other households. In one part of Scotland, it would appear that in some cases offspring were sent as servants to other households except during harvest time when they returned to meet the short term demand for extra labour. 2

1. Berkner. 'Stem family'; 413-415.

There were in addition the alternatives of not working the farm as efficiently as possible, or of altering the size of the farm as the size of the family expanded or contracted either by sale and purchase, or by changing the balance between land farmed direct and that rented to others.

Williams. 'West Country Village'; 47, 48.

2. 'Burgh Recs. Peebles'; 95 (1678).



However, it is becoming clear that some households with servants had children in service elsewhere. Not all offspring could expect a portion of the paternal estate, and service gave them a chance to establish themselves independently by learning special skills as an apprentice or as a servant in a merchant household. Service was a form of education, and the head of the household, in theory at least, was meant to teach his servants the basics of literacy, religion and manners. Even farmers' sons might gain from being servants of other farmers by widening their experience of husbandry as practised in other localities, with different soils and different crops and animals. One reason for servants changing masters so frequently (once or twice a year) may have been to broaden their knowledge, though this is more altruistic than the expectation of better conditions. Service also provided an opportunity for saving some capital. Most servants received some cash wages as well as clothes, board and lodging as payment. Over a period of perhaps ten years this money might make a difference, particularly if added to a small portion, when they married. The price of a cow, or pots and pans was better than nothing.

The enumeration of these four crises in the life-cycle shows how the kinship element in the structure of the household could vary in response to each kind of crisis. The structure had to be flexible because the well-being of its members depended on its ability to respond to changing situations. Additional flexibility was provided by the inclusion of servants as members of the household. The possible solutions were usually restricted but could still result in a wide variety of household structures. The emphasis is different from Laslett and Berkner who try to reconstruct an ideal family type from an analysis of listings. The approach here is closer to Homans' analogy of a chess game: the players are constrained in the moves they can make

but the objective remains the same, which was to survive and provide for all their offspring. The rules and some of the conventional moves can be deduced to describe the system. It is similar to Hammel's statement that there is "a set of rules operating within certain constraints that influence the rates persons are added to residential groups and that control the maximum size of these groups (zadrugas) by introducing pressures for continued accretion or for division".<sup>1</sup> Usually the events which marked the changes in these phases - marriage, birth, death, inheritance - were public events which integrated the domestic group into the total social structure, particularly its political, legal and ritual aspects. The public nature of marriage was particularly emphasised because it marked the reorganisation of kinship ties and changed the individual's status in the whole community. Marriage often marked entry into adulthood. It was on such occasions particularly that the community could apply pressure for regulating and controlling the formation and rearrangement of domestic groups.

The Western pre-industrial household was based on the relationships between parents and children. The basic unit was the conjugal family (ie parents and children). This unit was sometimes extended upwards as a conventional solution to old age and the stem family was part of this system. This co-residential pattern was not the only solution, and its prevalence depended on customs regulating time of marriage, formal transfer of inheritance, residence in the same household or house or family plot. There does appear to be a correlation between nuclear households and partible inheritance, and stem households and impartible inheritance. An important distinction is the dispersal of children - impartible inheritance probably promoted dispersal as the

1. Hammel. 'Zadruga as process'; 370.

children who do not inherit the holding have much to gain by leaving the paternal home: partible inheritance probably emphasised the advantages of staying at home or at least returning at the time of inheritance. In practice this distinction was likely to be less clear cut as one heir could buy out the other heirs in partible inheritance, and thus acquire the whole property. But the stem family was still part of the same Western family system as the nuclear family which was one of its phases.

Another important structural distinction of the Western Family system was the rule that there was only one married couple of the same generation in one household. 1

Lateral extension was rare and was most likely to occur if the heir inherited before all the rest of the offspring had been dispersed.

Frères were not part of the ideal life-cycle. Even in areas of partible inheritance, such as Corsica, they were probably a reflection of the incidence of the loss of both parents rather than vestiges of the patriarchal family - the older the head of the household the less likely was it to be constituted of brothers and sisters living together. 2

The extent to which households could adopt conventional or acceptable solutions to crises depended in part on economic factors. It is no coincidence for instance that the majority of co-residential kin were to be found in the households of a higher social status. Corresidence, however, was only one form of support and other forms of assistance should not be ignored. It must also be remembered that co-residential parents were not always a burden on the household. They might provide positive benefits to the household by contributing to the household's total income, or by releasing other members from household duties for

1. Demos. 'Little Commonwealth'; 63.  
Arensberg and Kimball. 'Family and community'; 204.

2. Laslett and Wall. 'Household and family'; 294.

more lucrative work outside. 1

The prevalence in different areas of the stem family and the conjugal family reflects the constraints in adapting different solutions to demographic crises in the Western European family system before industrialisation. The systems of inheritance are important as they partly reflected the different conceptions of economic opportunities and provided a framework of custom within which the alternatives were expressed. The analytical dichotomy between stem and conjugal households is weakened if relations between households in the local community are considered in addition to the composition of individual households. Kinship relationships and residential patterns within and between households is the context for attitudes to sex and marriage. The way different factors interacted to produce the household structure revealed by an analysis of listings is gradually being understood. But it remains to be demonstrated if Scottish households formed part of this Western European pre-industrial family system. For the purpose of this thesis it has been assumed that it did and that this kind of household was the type envisaged by Parliament and the General Assembly.

1. eg. Anderson. 'Preston in comparative perspective': the Laslett and Wall 'Household and family'; 226-231.

### 3. CANON LAW IN PRE-REFORMATION SCOTLAND

#### 3.1. Theology of Marriage

##### 3.1.1. Marriage as a sacrament.

Marriage was the only sacrament which was ordained by God in Paradise during the period of innocence before the Fall. It thus excelled all others in place and in time, and was instituted not merely as a remedy of sin but also as a duty. 1

The 'Catechism' states that the

"principal cause of matrimonye was that it mycht be ane figure or takin (Token) of that maist haly and beluffit conjunction that was to be betwene Christ to cum and the kirk". 2

Through this symbolism, under natural and Old Testament law, marriage could be called a sacrament "in as much as a Sacrament is the sign of a sacred thing", in this case "a symbol of the union of Christ with His Church". 3

The symbolism of marriage excels that of all other sacraments because, when consummated by carnal intercourse, it represents "the greatest benefit conferred by Christ on the human race". This 'unitas carnis' is one of the main themes which runs through both pre- and post-Reformation law (especially that concerning adultery and incest).

According to Hay this unity is symbolised in two ways:

"firstly by a conformity of nature, in that he took human nature into the unity of one person, and so the Church (ie the faithful people) is united as a spouse with Christ in an identity of nature. This unity

1. Hay. 'Lectures'; 19,21.
2. 'Catechism'; 235-236.
3. Hay. 'Lectures'; 41.

is symbolised by the union of the married couple whereby they become one flesh in order to beget a child, ... Secondly Christ is joined to His Church, that is to each faithful soul, by faith enlivened by charity. Matrimony symbolises this union by the loving, spiritual union of souls based on mutual consent and harmony of mind". 1

Marriage also excelled the other sacraments under the new law of grace. A sacrament was "the visible form of an invisible grace" and marriage was an "efficacious sign working ex opere operator, in virtue of the action itself". Expressed more simply, marriage was a sacrament because it was "a preservative against sin in the sense that what would be sin without it is no sin with it, or rather after it". Marriage was similar to other sacraments in that it was a remedy of sin, but differed as it had been instituted before the Fall as a duty as well. 2 Though marriage had been a sacrament before Christ, there were two peculiar conditions restored by Christ and St. Paul from the state of degeneration into which marriage had fallen after the expulsion from Eden. Monogamy was one: this basic principle distinguished a Christian marriage from a non-Christian or Old Testament marriage. The second was that marriage could only be dissolved by death:

"the band of matrimonie anis lauchfully contrackit, may nocht be dissolvit and lowsit agane by ony divorcement or partising, bot allanerly<sup>it</sup> it is lowsit be the dede of the ane of thame, for trewly the partising and devorsing, quhilk our salviour sais may be done for fornication, suld be understand allanerly of partising fra bed and

1. Hay. 'Lectures'; 19,21.

2. Hay. 'Lectures'; 41,19.

borde, and nocht fra the band of matrimony". 1

Neither of these principles of Christian marriage were part of its sacramental character.

Marriage was claimed to excel all other sacraments for three reasons -

- i. it was ordained in Paradise before the Fall;
- ii. it symbolised the unity of Christ with His Church;
- iii. it was a duty as well as a remedy.

### 3.1.2. Marriage and the control of sex.

Sexual intercourse was the sin for which marriage was the remedy.

It had the -

"efficacy to regulate and determine the proper circumstance in which the pleasures and pains of touch, that is the sexual acts, may be lawfully and properly performed without mortal sin, since these acts cannot be done lawfully except between persons joined in wedlock". 2

It would appear that all sexual acts, and not solely intercourse, were only lawful within marriage.

Regulations included, however, more than the status for the actors - it covered their attitudes and motives as well. The 'Catechism' states the third cause of matrimony as escaping the sin of fornication "and to use the pleasure of the body in the honestie of marriage". But this is qualified as intercourse was not intended for pleasure: a man sinned grievously if he "bot intendand principally to fulfill the lust of his body, and thairin puttis his felicitie". It was recommended that in such circumstance he should fast and pray to receive God's grace. 3

1. 'Catechism'; 237-238. See also: Matthew XIX,9 ; Mark X,9-12.

2. Hay. 'Lectures'; 3.

3. 'Catechism'; 235,240.

Hay describes intercourse as an act bound up with "modesty and sadness, so that it should not take place for the sake of lust, but in virtue and justice". 1

Perhaps too much stress should not be placed on these quotations, but they do show that in some instances the idea of sex as pleasure was denied. Practice was no doubt different.

Intercourse within marriage was only proper if the intentions were correct, otherwise it was fornication and thus a sin. The 'Catechism' says that the 'right' intentions were -

- i. to produce children for the service of God;
- ii. to keep the wife or husband from adultery and fornication;
- iii. when the husband intends to refrain from intercourse, but his will is broken by the fragility of his nature. (Perhaps this could be interpreted as meaning that the person felt guilty or had remorse after the act). 2

The second and third motives were important theologically (as opposed to socially) as it regulated intercourse between married couples who were unable to have children for whatever reason (eg impotence, age). Conception was not the sole justification for intercourse, and intercourse was considered permissible between married people beyond the fertile years. The avoidance of fornication was of such importance that the intention would excuse, though not remove, the sin of having intercourse when your wife was weaning or menstruating, or during other prohibited times and in prohibited places. It was an act of Christian charity to accede to intercourse if you feared fornication by yourself or your partner if you refused to render the marriage debt. 3

1. Hay. 'Lectures'; 115, 135, 139.

2. 'Catechism'; 240.

3. Hay. 'Lectures'; 137, 139; 149; 153.



The first motive was described in the 'Catechism' as the "generatioun and educatioun of barnis to the service of God". It was a cause of the ordination of marriage. 1

Here - as nearly always - procreation is bound with education. Procreation for the sake of the multiplication of mankind is less important than might be thought. The injunction to 'Go forth and multiply' (Genesis IX) was not binding on all people at all times; it was applicable only when the population was decimated by disasters - war, epidemic, and famine. The circumstances had to be comparable with the Flood after which God spoke these words to Noah and his sons.

The emphasis is on the desire to bring up children to serve God. Both Hay and the 'Catechism' always combine the two, children and education. Marriage as a duty existed

"in the intention of offspring. But to have the intention of offspring is not precisely the desire to beget children, but the desire to bring up children properly and piously, if any are born, and to do nothing to prevent their birth". The purpose of marriage was the "welfare of the children". 2

There was therefore an emphasis on family education and an implied denunciation of contraception and abortion.

The Church before the Reformation did not disapprove of sexual intercourse as such. Its attitude depended on three variables:

- i. the status of the man and the woman, ie. within marriage;
- ii. the time and place, eg. during weaning, or in a churchyard;
- iii. the attitudes of the man and woman, eg. to avoid fornication, to produce children for the service of God.

1. 'Catechism'; 235.

2. Hay. 'Lectures'; 115, 39.

It is these variables which determined the ideas of the Church to sex rather than the simple view that the Church did, or did not, approve of sex.

### 3.1.3. Remarriage

The positive value given to marriage in the interpretations of the Old Testament is balanced by the qualifications of St. Paul in the New Testament. Temperance to St. Paul was a compromise between an ideal and man's fallen nature: the most perfect form of chastity was temperance. He placed the emphasis on marriage as the remedy for sin.

"It is good for a man not to touch a woman. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband ..... I say therefore to the unmarried and widows, It is good for them if they abide even as I. But if they cannot contain let them marry: for it is better to marry than to burn". 1

The counsel (not a commandment) of St. Paul was to marry or be chaste in widowhood, for those who lacked the strength of will to retain their virginity. The advantage in chastity was that the unmarried could more easily transcend the temporal world and concentrate their minds on God and His works:

"He that is unmarried careth for the things that belong to the Lord, how he may please the Lord: but he that is married careth for the things that are of the world, how he may please his wife." 2

Within this framework widowhood becomes a second chance to show strength of will and education to the lord by not remarriage. This is again a counsel and not a commandment:

1. 1 Corinthians, VII, 1-3, 8-9.

2. 1 Corinthians VII, 32-34. See also 'Catechism'; 89-90.

"The wife is bound by the law as long as her husband liveth: but if her husband be dead, she is liberty to be married to whom she will; only in the Lord. But she is happier if she so abide, after my judgement: and I think also that I have the Spirit of God." 1

The Canon Law, however, was more guarded and there was discrimination against marrying more than once, even if it was frequent in practice. Hay recognised that if certain conditions were fulfilled and the persons were lawfully capable of doing so, second marriages could be lawfully contracted - and not merely second marriages but as many as a person liked as no limit was laid down. But such marriages lacked the perfection of first marriages and were without honour or glory. They were a sign of incontinence and were "not a symbol of the union of Christ and His Church". These marriages

"should not be blessed if either of the parties has already received the blessing .... either in a valid or invalid marriage. If neither of the parties has received the blessing before, the second marriage should be blessed. Local custom should always be observed, for in some places if either of the parties is a virgin, the marriage is blessed." 2

#### 3.1.4. Social functions of marriage

The theology of marriage recognised social functions other than the perpetuation of society by procreation, and the legitimization of the sexual urge. These two themes were expanded, as has been seen, into the upbringing of children - their education in the service of God.

1. I Corinthians, VII, 39-40.
2. Hay, 'Lectures'; 249, 251. It should be noted that 'bigamy' had a different meaning to what it has now - see Hay, 'Lectures'; 253.

Marriage was a vehicle for the transmission of the Christian faith. As early as the thirteenth century, for instance, there was a statute of the Provincial synod which ordained that all prelates should warn and persuade their parishioners "themselves to explain that same faith to their children and to teach them to keep the Christian faith". 1 Two hundred years later, the 'Catechism' explains in more detail the parents' responsibility for all within the household, which was similar to that of the school-master to his pupils. The name of God was used righteously in private

"quhen the father techis his childrin and bardnis, the master his servandis, the scuile master his disciples, how thai suld trow the artikillis of thai Crede, how thai suld keep and ken the commandis of God, and fle fra all sinnis, and how thai suld pray to God for grace, be devote and faithfull prayar and saying of thair 'Pater noster'." 2

But the significance of marriage was recognised as going much further. Its importance is shown in Hay's condemnation of bastardy:

"A fleeting union between man and woman is repugnant and contrary to the welfare of the child, family and state, to natural reason and Sacred Scripture". 3

Marriage marked the establishment of a new independent social Unit by the removal of a couple from their parents' households. The 'Catechism' paraphrases Genesis II:24 (and also Matthew XIX:5-6) as that Adam said: "The maryit man sall laif his father and his mother, so that he sall nocht be oblissit to dwell with thame, and he sall adheir and dwel with his wife." 4

1. 'Statutes'; 9, no.3, c.1237-1286.

2. 'Catechism'; 60.

3. Hay. 'Lectures'; 37.

4. 'Catechism'; 235.

It was to this independent couple, bound together in a spiritual and physical bond to which was entrusted by society the education of children. Thus to Hay bastardy is condemned as

"repugnant to the welfare of the offspring because if the child were born of adventitious intercourse, no one would know who was the father who ought to educate the offspring, look after the mother and succour her in want. For the same reasons it is repugnant to the welfare of the family, since the good of the family consists in the strong and loving union of the principal members of the family, the father and mother. This would not exist if the persons were not certain and definite, but just anybody .... The mother's task is to feed and the father's to instruct." 1

Marriage is also in the best interests of the parents (and society) as in theory it provides for their old age:

"When the parents have grown feeble through old age or for any other reason, their able-bodied children should come to their aid. These things however would not happen if intercourse was adventitious." 2

The 'Family' was expected to support its members from birth to death based on reciprocal obligations between parents and children, the parents bringing up the children on the understanding that their offspring would support them in turn when they were old or infirm. The fourth commandment was interpreted as ordering everyone to love

"with thi hart thi father and thi mother, honour thame, gife thame part of thi temporal guddis gif thow hais and thai mistir, the mak thame service, gif mister for eild or seiknesse, schortly, help thame with thi counsel, counsolatioun, service of the bodie, and sustentatioun with thi geir quensaever thai mister." 3

1. Hay. 'Lectures'; 37.

2. Hay. 'Lectures'; 37.

3. 'Catechism of 1552'; 81-82.

Hay's last reason against bastardy places marriage within the context of the links which exist between the families in society.

"Adventitious intercourse is repugnant to the welfare of the state since the good of the state chiefly consists in the degrees of consanguinity and affinity, because those who are related by blood or marriage are more ready to rally to the defence or development of the community than others. If intercourse were adventitious this consanguinity and affinity would not be known". 1

This emphasises the patrilineal nature of society: the mother would still be known, but it is the father who is important as the link in kinship. This functional condemnation of bastardy is a description of kinship and can be used to explain its maintenance but not its origin. Exogamy forms alliances only where there is a value system which includes the necessary mutual expectations.

The Canon Law includes important social functions as part of the theology of marriage:

- i. a justification for a child leaving its parents,
- ii. the upbringing of children,
- iii. the support of the old and infirm,
- iv. the establishment of kinship ties within a society.

### 3.1.5. Theological essentials for a marriage to be valid.

A quality essential for the validity of a marriage was "a true consent to the mutual giving of the body for matrimonial acts, and which .... efficaciously signifies grace". 2

- 1. Hay. 'Lectures'; 37.
- 2. Hay. 'Lectures'; 17.

This consent was not to

"carnal copula, but consent to conjugal copula, which means, according to Augustine, that union of souls which can come about without carnal copula, and exists between those who are completely impotent or sterile". 1

Consummation of sexual intercourse was not necessary as "consent to conjugal union of minds is sufficient for marriage, even though there is no thought of carnal copula." 2

It was unnecessary to request intercourse or to have children for a marriage to be valid and indissoluble. As Hay emphasised -

"these two benefits as far as they are concerned with the implementation of the contract are not essential to marriage and involve an act which is subsequent to the marriage itself. But as far as the obligation is concerned, they are essential to the marriage and perfect it, they are the perfections of the marriage itself." 3

The giving of control over your body to your spouse was taken literally (at least as far as the husband's rights were concerned). The marriage debt had to be rendered (ie. sexual intercourse consented to) unless there were lawful reasons for not honouring the contract at that particular time and place. An extreme example of the extent of this control is for instance, if a woman was impotent with her husband because of the smallness of her passage, the decision to have an operation for enlargement was not hers. It did

"not matter whether the woman wants this or not, since the husband can and should compel her, since in what concerns marriage the woman's body belongs not to herself but to her husband." 4

1. Hay. 'Lectures'; 305.
2. Hay. 'Lectures'; 307.
3. Hay. 'Lectures'; 133 and also 131. (The three benefits of marriage were indissolubility, fidelity and offspring).
4. Hay. 'Lectures'; 131, 107.

This consent to the mutual giving of bodies had to be free, and not forced or the result of 'just' fear. The basis for this was divine institution and natural reason which

"tells us that no one ought to be compelled to undertake some great, onerous and almost intolerable burden to which he is not bound by natural or divine law." 1

All sacraments had their own visible expression. The outward sign for the sacrament of marriage was the expression of mutual consent: this was the second requirement for a marriage to be valid. The exact form did not matter so long as it referred to the present - it could be "in words, writing, gesture or anything else which adequately expresses mutual consent." 2

A form of words, given as an illustration in the 'Catechism', "quhairby the ane giffis to the either powar of thair bodie, exprement thair consent to the same be wordis of the present by me" was "Quhen the man sais to the woman, I tak the to my weddit wyfe, and the woman sais to the man, I tak the to my maryit husband, baith of thame ending thir wordis be invocatioun of God, sayand: In the name of the father, and the sonne, and the holy spreit." 3

The invocation of God did not make the consent any more binding, as under Canon Law a promise was as binding as an oath.

The last requirement for a marriage to be valid was that the couple were lawfully capable of contracting marriage. Impediments which impeded and nullified the marriage contract were called direment. Hay summarised these as

1. Hay. 'Lectures'; 23.
2. Hay. 'Lectures'; 17.
3. 'Catechism'; 239.



"Error, condition, vow, relationship; crime, disparity of worship, force; order, marriage bond, propriety; if there is affinity, if perchance you cannot come together, these forbid marriage and make it void." 1

Thus for a marriage to be valid, three things were required: mutual consent to the giving of their bodies, an outward sign expressing that consent, and that the persons were lawfully capable of contracting marriage. All three were necessary - "these three things are so related that neither one nor two are sufficient without the third." 2

### 3.1.6. Kinds of marriages.

Hay classifies marriage into three kinds based on theological distinctions. They are arranged from the least perfect to the most perfect kind of marriage, and illustrates the insignificance of consummation in determining the validity of a marriage. This classification does not take into account the rituals surrounding the exchange of consent.

The first and least perfect was incomplete marriage. This was the same as betrothal, and was when consent was made in words referring to the future ('I shall') and without subsequent carnal copula. The alternative description of inchoate marriage hints at why betrothal was a step in the transition from single to married status, and was not a permanent condition. The couple's obligations reflected this half-way position.

The second was a valid marriage: mutual consent made in words of the present time ('I do'), but without subsequent sexual intercourse. An example of such a marriage was that between the Virgin Mary and

1. Hay. 'Lectures'; 49.
2. Hay. 'Lectures'; 17.

Joseph. Carnal copula was not required for a valid marriage.

The most perfect form of marriage was a valid marriage which had been consummated. It is worth quoting Hay at length to show exactly in what way it was more perfect.

"Consummated marriage is not perfect in the sense that it is essentially more perfect than merely valid marriage, because essentially both are equally perfect. Merely valid marriage has all the essential requisites of marriage, and is perfect in the sense of essential perfection. But it is not so perfect in its symbolism, since it does not symbolise the union between Christ and His Church as perfectly as consummated marriage, for consummated marriage symbolises the union between Christ and the faithful soul by grace and the union of the divine nature with the human more perfectly than a merely valid marriage. It is not made more perfect by subsequent carnal copula as far as its sacramental reality and sanctity are concerned." A valid marriage was only less perfect than a consummated marriage in its symbolism . 1

It is characteristic that the sexual nature of the symbolism of 'unitas carnis' is emphasised. This emphasis continued to be of importance after the Reformation.

### 3.2. Betrothal

#### 3.2.1. Definition and requirements

Betrothal was a "promise or engagement of future marriage": it was a promise of marriage made 'per verba de futuro'. Marriage was usually

1. Hay. 'Lectures'; 27, 29, 305.

preceded by a betrothal, but it was "neither a part of marriage" nor "a necessary preliminary to marriage, since marriage is sometimes contracted lawfully without any betrothal". The requirements for an engagement to be valid were similar to those for marriage - the free consent of both parties expressed outwardly, and the persons had to be lawfully capable of contracting marriage (the impediments were similar to those of marriage). A betrothal could be contracted from the age of seven. 1

The Scottish Church required that betrothals should be made in front of a priest. This was a quality which was not essential for its validity - as with marriage, it ensured that there would be sufficient witnesses to prove that the promise had been made and freely given. As early as the thirteenth century, the Synod of Aberdeen ordained that none should contract betrothal save in the presence of a priest and three or four trustworthy witnesses. 2

The same requirement was ordered by a statute of the Synod of St. Andrews at the beginning of the sixteenth century. The preamble is more informative as to the reasons why betrothals should be made in public. The act was occasioned by two evil customs which had increased to such an extent that they deserved condemnation. The first was that -

"to the hurt of their souls many, contrary to the laws and the sacred canons make secret compacts and a kind of espousals privately and in a concealed manner, followed by carnal union before marriage is contracted: whence arise troubles and disputes that afterwards come in the way of lawful marriages actually contracted or about to be contracted."

1. Hay. 'Lectures'; 155, 5, 7.
2. 'Statutes'; 39, no.66. c.1217-1300: the wording of the complete statute is largely taken from the Constitution of Sarum, 1217, and the statutes of the Council of Durham.

The second is similar - except the betrothals are not made secretly:

"many contrary to the laws, after espousals made 'per verba de futuro', and before the contraction of marriage and its solemnisation in the face of the church then and there making it binding, do not hesitate to pass to carnal union". 1

Betrothal did not make intercourse lawful between the couple - they still had to wait until they exchanged consent in words of the present time. Intercourse subsequent to an engagement could cause legal disputes if either party wished to repudiate the betrothal as it could be used as proof of a marriage (see 3.3.4). The difficulties would be exacerbated if the betrothal was made clandestinely. That this was the 'real' evil is shown by the careful wording of the condemnation. Marriages solemnised in churches were binding because the promise was made "then and there": the distinction is being drawn between consent 'de futuro' and consent 'de praesenti'. The fact that 'betrothal plus intercourse' could be used as proof of marriage did not condone antenuptial fornication. A court of law had to judge such claims and pass sentence before a person could lawfully enjoy the rights of marriage. The statute makes no claim that marriages not solemnised in church were invalid. Secret betrothals were condemned on pragmatic and not theological grounds.

To extirpate these abuses, priests were ordered to enjoin all their parishioners four times a year by general proclamation of excommunication

1. 'Statutes'; 267-268, app II, xxiii, no.10.

"not to contract clandestine espousals secretly and in private, but contract them publicly before the priest, with a sufficient number of witnesses. And that after the espousals have taken place all priests of this diocese (St. Andrews) shall strictly prohibit those who have contracted them from having carnal union until marriage has been lawfully contracted and solemnised in the face of the church by a form signifying that it is then and there made binding. And let this be strictly observed by widows as well as by others."

The contracting parties, if they contravened the statute, were liable to a penalty of ten shillings, the sum to be applied to the maintenance of the fabric of the church of St. Andrews. 1

Public celebration of a betrothal (or marriage) did not affect its essential validity: public performance made the facts easier to ascertain if there was any subsequent dispute, and gave an opportunity for objections to be made before the marriage was finally contracted. Their function was similar to that of the proclamation of banns. The law on the proof of a marriage by 'betrothal plus intercourse' may partly explain why the registers established by the same synod recorded the proclamation of banns and not marriages - banns were a public declaration that a betrothal had been made.

### 3.2.2. Legal force.

Betrothal, even when it was not reinforced by an oath, was a legal contract whose non-performance was a grave sin, unless there was a lawful impediment. The breaking of a betrothal was a legal act which, under Canon Law, could not be done without the intervention and judgement of the ecclesiastical authorities. The authority of an official

1. 'Statutes'; 267-268, app II, xxiii, no.10.

and his sentence of separation was required for a legal annulment except when effected by religious profession, a 'de facto' marriage contract made with another person 'per verba de praesenti', or by the reception of sacred orders. Under these circumstances the betrothal was dissolved 'ipso jure'. 1

Mortal sin was committed by all involved in the breaking of a betrothal:

"also by parents who promise their son or daughter to another, as well as by those who co-operate and give support, counsel or help in the non-fulfillment of the original betrothal in order that a richer, more noble or more powerful match may be found, for they can all be said to break faith in some way." 2 The Canon Law thus recognises that the couple was unlikely to be able to make a 'free' decision - parents and others would offer advice, the others presumably being relatives and friends. It did not recognise, however, as adequate reasons for breaking one's faith those temporal aspects of choosing a match which seem to emphasise the interests of the family, rather than the wishes of the couple.

The Church could compel a betrothed couple to marry, and this did not compromise the idea of their free consent as being essential for the marriage to be valid. This was because the Church was insisting on the fulfilment of the promise or oath to marry, and was not forcing the couple to consent to marry. A man was bound by divine law to carry out his freely made promise. In such cases, the Church had regard, as with the impedient impediments to marriage,

1. Hay. 'Lectures'; 15.

2. Hay. 'Lectures'; 7.

"that a greater evil than the non-fulfillment of the oath or promise does not ensue, for fraternal correction must sometimes be omitted when it is feared that it will make matters worse, or when no good can be expected." 1 This qualification allowed the 'best' interests of the couple to be considered.

### 3.2.3. Impediments to betrothal.

The impediments to betrothal were similar to those of marriage, and provided grounds for annulment. They include: entry into religion, reception of a sacred order, ill-treatment, public propriety and subsequent deformity. Spiritual (ie. heresy) or bodily fornication justified non-performance as there were grounds for fearing repetition after marriage; but if the "innocent party desires to go through with the marriage the guilty one may not lawfully refuse". In the case of betrothals contracted during non-age, the betrothed could petition for dissolution at the age of puberty as long as they had not exchanged consent when of age. When only one of them was of age, he or she could not sue for annulment unless there existed another lawful impediment.

With two impediments, the Canon Law of betrothal differed very much from that of marriage. Mutual consent was a sufficient cause for dissolution, as betrothal was a human bond unlike marriage which was a divine union. If a fiance had been absent for over two years in a distant land, a dissolution could also be obtained; the time limit was flexible as the judge could vary it according to the absentee's character. 2

1. Hay. 'Lectures'; 9.
2. Hay. 'Lectures'; 9, 11, 13. An example of a document relating to the dissolution of a betrothal by mutual consent is 'Prot. Bk. Grote'; 7, no.38.

### 3.3. Irregular or clandestine marriages, and legal proofs of marriage.

#### 3.3.1. Definition of clandestine marriage.

Clandestine marriages were one of the main concerns of the Scottish Church throughout the period covered by this thesis, and have reached prominence in the popular imagination through the Gretna Green marriages of a later period. It is particularly important that the meaning of clandestine is understood, and not confused with questions about the validity of a marriage or judicial proofs of marriage.

Hay gives a precise definition:

"Clandestine marriage means a marriage which is not contracted according to the custom of the country nor before sufficient parents, friends or witnesses to testify to it ..... two things are necessary for a non-clandestine marriage. The first is that it should be according to the custom of the country and observe the solemnities and requirements of the synodal statutes. The second is that it should be before witnesses." 1 As far as can be judged from the scanty material of the local statutes, the Scottish Church followed the practice of the Continent and did not have any local customs enforced by statute.

The validity of a marriage was not affected by it being clandestine: you could have invalid clandestine marriages as well as valid clandestine marriages. Regularity was not one of the essentials of marriage . Hay explains:

"Although persons capable of marrying commit sin by contracting a clandestine marriage, the marriage is valid .... They commit sin because they disobey the precepts and constitutions of the Church ... although the law forbids clandestine marriage, it does not make the

1. Hay. 'Lectures'; 29.



persons incapable or unfit, as it does in the case of persons who contract within the degrees forbidden by the Church. For it is not of the essence of marriage to contract it in the presence of the Church and according to the custom of the country, but a matter of propriety. The fitness of the parties is of the essence of marriage. As far as the solemnisation of marriage goes, this is merely a matter of propriety and respectability, and serves to guard against many dangers." 1 The customs were man made and not ordained by God; hence, they were merely matters of propriety and did not affect the validity of the marriage. The Church could not declare such marriages invalid, and had to rely for the enforcement of its customs by punishing the people involved. The "great dangers" will become apparent in the discussion of banns, and the legal proofs of marriage.

### 3.3.2. Restrictions on time and place.

Irregular marriages included those contracted where there existed an impedient or prohibitive impediment which did not affect the validity of the marriage. There were, however, 'customs' which were not concerned with the status of the couple. Two of these were restrictions on time and place.

A regular marriage had to be celebrated 'in facie ecclesiae', (which meant probably in a church as a building rather than the church as the body of the faithful) and before a priest. It was not lawful for a marriage to be celebrated, even with a priest officiating, in a house or a private chapel. It appears to have been common to include in marriage contracts a clause specifying that the marriage was to be solemnised in church. 2

1. Hay. 'Lectures'; 31.
2. eg. 'Prot.Bk. Gaw'; 12, no.51(1545).  
'Prot.Bk.Carruthers'; 52, no. 157(1559).

This emphasises the public nature of marriage as the church was likely to be the most important meeting place and centre of community life.

A marriage could not be lawfully solemnised during certain periods of the year. Hay gives these as

"from the first Sunday in Advent until the octave of Easter, and also from the three days before the Ascension, which are called Rogation days, until the feast of the Trinity inclusive." 1 As these periods are fixed by movable feasts, they cannot be expressed as calendar days: however, it excludes about 25 weeks from mid-winter, through spring to the early part of the summer.

Neither Hay nor the Statutes mention other temporal constraints - for instance, no marriages on Sundays nor during the hours of darkness. Based on just two sources, this negative evidence should not be taken to imply that such bans did not exist. It would be surprising if the Church did not discourage the solemnisation of marriages at unusual hours.

### 3.3.3 Banns.

Better evidence and from an earlier period is available for the application of banns: this is probably a reflection of their significance for the enforcement of Canon Law. Their connection with impediments is brought out by a statute of the synod of Aberdeen, which incorporated the enactments of the fourth Lateran Council in local Canon Law. It was ordained:

"Let no priest presume to unite in marriage any persons unless a thrice-repeated proclamation, according to the form prescribed by the General Council, have previously been publicly and solemnly made in Church, so that any one who will and can may state a legal impediment.

1. Hay. 'Lectures'; 155.

And let priests proclaim that on pain of excommunication no one shall maliciously offer impediments to marriage. Let the said priest himself over and above investigate whether any impediment exist, and if there seems to be a probable presumption against contracting the marriage, let the union be expressly interdicted until it shall appear on clear evidence what ought to be done about the matter. We also forbid the clandestine contracting of marriages, and ordain that no priest shall presume to have anything to do with such marriages, and let him who does contrawise be canonically punished".<sup>1</sup> This statute makes it clear that marriage was to be performed publicly to prevent the contracting of invalid or unlawful marriages. The proclamation of banns was intended to prevent unlawful marriages by giving time and opportunity for impediments to be discovered. The gravity of the offence is emphasised by the severity of the punishment - excommunication. The statute erred on the side of caution by obliging the priest to make his own enquiries and not to rely on the silence of others as showing absence of impediments, and by interdicting marriages where there was any doubt. Priests were also forbidden to have anything to do with clandestine marriages to prevent such marriages from appearing lawful and respectable.

A similar statute of the diocese of Aberdeen from the same period adds further details. It was forbidden for anyone

"to contract marriage without triple proclamation of banns solemnly made in the parish where they live, if they reside in the same parish. If they live in different parishes, the proclamation must be made in both, and no spousals must be made without trustworthy and lawful witnesses." <sup>2</sup> The banns had to be proclaimed in those places where

1. 'Statutes'; 39, no.66, c.1217-1300.

2. 'Statutes'; 44, no.83, c.1200-1300.

people were most likely to know of any impediments. This was not stated in the previous statute, but it was probably meant to be understood. It is difficult to see why the problem of betrothals was coupled with that of banns - perhaps disputes had arisen where banns had been proclaimed and the intention to marry repudiated by one or both of the parties, or a marriage claimed on the grounds of 'promise plus intercourse'.

The diocesan synod of St. Andrews enacted a similar statute in 1242:

"Marriage must absolutely not be contracted .... unless it has been preceeded by a threefold solemn proclamation, as well of the man as of the woman, publicly made in the church on three Sundays." 1 The phrasing seems to imply that sometimes banns had only been proclaimed for the woman, and that the proclamations had been made within too short a period.

From these three statutes it would appear that banns were to be proclaimed three times for both parties in their respective parish churches on Sundays. There is no mention of a period by which time the marriage should be solemnised. These statutes made clandestine a marriage made without the proclamation of banns.

There are no further surviving statutes on banns until the early sixteenth century; however, it is clear that the earlier statutes were considered to be still in force and were probably augmented by other enactments during the intervening two hundred years. However, they seem to have been ineffectual in practice both in enforcing the proclamation of banns and preventing the celebration of clandestine marriages. The Diocesan Synod of St. Andrews passed an act, circa 1515-1521,

1. 'Statutes'; 63, no.121, Constitutions of Bishop David.

"for the restraining of the abuses on the part of certain of the regular clergy who are not afraid even publicly to contravene the laws and sacred canons which forbid the solemnisation of clandestine marriages and of marriage of any kind at seasons prohibited by the church." The act prohibited priests from solemnising, or venturing to solemnise,

"matrimony between any persons whatsoever at a time prohibited by the church, or any kind of clandestine marriages, and not till after the banns have been solemnly proclaimed on at least three festival days respectively as of right".

It will be noticed that banns are proclaimed on festival days and not just Sundays. The penalties were severe. An offending priest was to be suspended from celebrating divine rites, and fined 40 shillings to be spent on the fabric of the church. The couple<sup>p</sup> were to be separated from each other for a month, underlie excommunication, and pay 40 shillings, or 10 pounds if noble or of rank, for the fabric of the church before receiving absolution. 1

It is probable that clandestine marriages and the omission of banns became more common in the years preceding the Reformation. The novel dimension was that people were not observing "those ancient statutes of provincial councils anent clandestine marriages and due proclamations of the banns" (which do not seem to be preserved) for theological reasons. The relevant statutes of the General Provincial Council of 1552 were aimed against the Reformers as much as the age-old problem of discipline. The Scottish Church was reacting against those priests who were administering the sacrament of marriage in a heretical manner (eg. within the forbidden degrees).

1. 'Statutes'; 268-9, app II,xxiii, no. 11.

Two statutes of this Provincial Council were concerned with clandestine marriages and banns. The first was concerned more with the enforcement of existing statutes than punishing the Reformers. It was statuted that the curates of each parish should keep a register of all proclamations of banns with names, dates and the signatures of two witnesses. The register was "to be treasured amongst the most precious jewels of the church." The act reiterates earlier statutes by stating that banns were to be proclaimed "in the parish churches both of the man and the woman respectively, if they reside in different parishes". The same act established registers for baptisms. It is curious that the register is for banns and not for marriages. 1

The second statute ordained penalties for those ministers who officiated at a clandestine marriage: it was an addition and an amendment to an existing Provincial act. Perhaps the statute of the St. Andrews Diocesan Synod, circa 1515-1521, was based on an act of a Provincial Council as no other extant act ordains penalties. Offending priests were to be imprisoned on bread and water for a year, and be suspended from the exercise of their sacred functions for three years. The offending couple were to perform public penance, adjusted according to their rank and condition. The act exhorted the ordinaries to be diligent - "in no instance be too remiss in this respect, that at least through fear of punishment the very many inconveniences which hence arise may be eschewed." 2

There is continuity in the requirements for the proclamation of banns from their first application in the early thirteenth century to the eve of the Reformation. The Scottish Church had established

1. 'Statutes'; 142-143, no.251.
2. 'Statutes'; 143, no.252.

a means of applying control over marriages which was retained by the Reformers, and continues until this day. The Reformers shared too the problem of enforcing the proclamation of banns, and the prevention of clandestine marriages.

#### 3.3.4. Legal proofs of marriage.

The Scottish Church desired to regulate the contraction of marriage for two reasons -

"Many evils follow from clandestine marriages without witnesses, namely the dissolution of valid marriages, when those who have contracted a valid marriage deny that they have done so, or when one party denies the contract and the other affirms it. Similarly the children of a clandestine marriage without banns are sometimes illegitimate if the contracting parties are within the forbidden degrees, even without knowing it." 1

Children were illegitimate if the parents had contracted 'marriage' when they were not lawfully capable of doing so. The incapacitating conditions were called diriment impediments, and included those of kinship, and 'just force and fear'. The proclamation of banns was intended to give people the opportunity to declare impediments which the couple might not know existed, before the marriage was contracted.

The intention was to forestall the contraction of marriages which could never be valid, and to ensure that the necessary dispensations to remove any prohibitive impediments were secured before the marriage.

The second problem was the legal difficulties in proving the existence of a valid marriage. The regulations as to the place, and

1. Hay. 'Lectures'; 31.

before witnesses were intended to ease these difficulties. Legal disputes over inheritance, legitimacy, and the validity of marriages, were the Church's particular concern as the cases were pleaded before the Official's courts. The preamble of the provincial statute which established registers for proclamations and baptisms complained that

"it is full well known by daily experience and pleas and debates on births and clandestine marriages, that people, even although they have been legitimately born, are brought into the greatest risk of losing inheritances from their fathers or forebears, and all their fortunes, and this chiefly through lack of legal documents bearing upon births and dates of birth and proclamations of the banns". 1

The issue of clandestine marriages was more than a test of the discipline of the Church, or a zeal for correctness. It was important for very practical reasons of great importance - property and kinship were the sinews of society.

The problem, however, had to be resolved of how to prove in a court of law the validity of marriages which were contracted irregularly, especially those with few surviving or trustworthy witnesses. Evidence was required to give a presumption that a marriage existed. It will be recalled that two of the three theological requirements for a marriage to be valid were mutual consent to the giving of their bodies, and an outward sign expressing that consent. Later lawyers divided the legal presumptions into three categories.

The first was proof by 'sponsalia per verba presenti', which included marriages contracted regularly, the marriage promise being expressed in words of the present time when no diriment impediment existed.

1. 'Statutes'; 142, no.251, 1552.



This should have presented no difficulties so long as there existed documentation of the promise, or witnesses to the marriage. Hay does not mention this separately probably because it had already been covered in his discussion of the theological validity of a marriage.

Problems arose, however, where evidence did not exist of a promise 'de presenti', but only one 'de futuro'. A betrothal was insufficient proof as it was not a mutual consent to the giving of bodies - it was only an expression of intent. Evidence was required to show that this consent had been given subsequently. This form of proof of a marriage is known as 'sponsalia per verba de futuro carnalia copula subsecuta', or 'sponsalia per verba de futuro cum copula'. Evidence of sexual intercourse created the presumption that there existed mutual consent to the mutual giving of their bodies, expressed outwardly by performance. Consummation created the presumption that a marriage existed, though copulation was not necessary for a marriage to be valid. It must be emphasised that 'betrothal plus intercourse' created a presumptive marriage which would be accepted in a court of law as valid: it was not an alternative to a marriage in Church. It was still a mortal sin if an engaged couple had intercourse before marriage had been contracted, firstly, because it was against the canons of the Church, and secondly, because marriage was contracted by consent expressed in words of the present time.

The implications of this legal proof can be illustrated in several ways. A betrothal could be dissolved with the consent of both parties if intercourse had not subsequently taken place, and thus a presumptive marriage did not exist. This is what seems to have been at issue in a notorial instrument of 1550:

"Duncan Davidstone and Elizabeth Malcum accused by a temporal assize at Clatt that they were fianced, compeared personally before the Dean of Gareaucht with certain compurgators, honest men, who upon oath purged them with canonical purgation that there was no carnal intercourse between Duncan and Elizabeth, and each of them exonerated the other of marriage and that neither of them desired to complete marriage with the other." 1

The implications of this form of legal proof can also be illustrated by marriages contracted with conditions. Usually the marriage remained in suspense until the condition was fulfilled, but if carnal copula took place the condition was regarded as void. For instance, if the condition was that the girl was a virgin, the marriage would be invalid if she was found not to be a virgin by a "bodily examination by respectable married women". If the affianced man had "carnal intercourse with her and finds out that she is or is not a virgin, the marriage is valid, since the condition has been superceded by carnal copula, and it becomes a presumptive marriage, and the condition, though evil, is not contrary to marriage and so is taken as non-existent". 2

The third legal proof of marriage was the possession of the state of marriage 'nominatio, tractatus, fama'. It is surprising that Hay makes no mention of this, though perhaps this was because he was a theologian lecturing on theology, and not a canon lawyer concerned with the conflicting claims in disputes before the Church's courts. He was more concerned with the forum of conscience rather than methods of judicial proof.

1. 'Prot.Bk.Cristi\_sone'; 96,no.417.

2. Hay. 'Lectures'; 175.

'Nominatio' referred to the assumption of the same surname by a couple. Cannonists attached little importance to this as a mistress could easily take a man's name to acquire respectability. It was of even less importance in Scotland where the wife rarely took her husband's name at marriage, at least until the seventeenth century when the custom was adopted from England.

'Tractatus' was cohabitation over a long period during which the couple treated each other as husband and wife, both personally and for legal obligations. Proof had to exist for a number of years and not just that people thought they had treated each other as husband and wife for some time. This combines with 'Fama' or common report. It had to be known by the community at large that they treated each other as if they were married. Long cohabitation and common knowledge was sufficient proof of marriage. Consent was presumed from their long-standing and well-known treatment of each other as husband and wife. 1

Each kind of evidence on marriage has its own viewpoint. Hay gives the theological aspect as taught at the University of Aberdeen. He emphasises that a valid marriage consisted solely of the free and mutual consent to the giving of their bodies exchanged by a couple lawfully capable of contracting marriage. The solemnisation of marriage in a church was a matter of mere propriety. The 'Statutes' give the pragmatic, legislative side. The emphasis on the proclamation of banns and solemnisation in a church arose from a need to regulate the contracting of marriage. This was to prevent the celebration of invalid marriages as defined theologically, and to ease the problems in proving the existence of a marriage in law suits.

1. Scanlan. 'Husband and Wife'; 74, para.16.

### 3.4. Divorce and dispensations.

#### 3.4.1. Annulment and separation.

The indissolubility of the marriage bond was the ideal and rule of Canon Law. There was no divorce from a valid and consummated marriage; freedom from the bonds came only through the death of the spouse. But there were annulments and separations. Hay distinguishes the two in the following manner:

"There are two kinds of divorce. One is divorce from cohabitation at bed, board and the marriage debt. The other is divorce from the marriage bond, such that the divorced parties may lawfully contract marriage with others. This sort of divorce can never occur in a lawfully contracted and consummated marriage except by the natural death of one of the parties..... We say 'consummated' marriage because when the marriage is valid but not consummated, there can be a divorce by civil death, by entry into religion, which is the same thing, so that the married person who remains in the world can contract marriage with any other lawfully capable person after the profession of the one who enters religion." 1

Annulment, or a decree 'a vinculo', was the nearest equivalent to divorce. A subsisting marriage was declared void on the grounds of some impediment existing at the time of marriage which had not been removed by dispensation: it was a declaration that there had never been a valid marriage. A licence to remarry was probably usual unless there was the risk that the guilty party would benefit from his own evil. Thus a distinction was made between cases where the impediment was known at the time of the marriage, and those where the parties married in ignorance or with good intentions.

1. Hay. 'Lectures'; 59.

A decree 'a mensa a thoro' did not usually include a licence to remarry; the marriage was not dissolved nor declared null. The innocent party was merely relieved of the further performance of the matrimonial duties, principally of bed and board. Hay illustrates the rights and obligations surrounding a separation with the example of adultery; his example will be followed later.

There were, however, grounds other than adultery. The spiritual equivalent of carnal fornication was heresy, but it was insufficient for separation unless the heretic was altogether incorrigible. The innocent party was advised to continue to cohabit with the spiritual fornicator for the sake of their salvation, and could be compelled by the Church to take back the guilty party if he wished to reform and abjure heresy, or was converted to the faith. 1

The only other principle admitted was that "one is not bound to render the (marriage) debt with probable danger to life and limb". This was not the canon law equivalent of divorce on the grounds of cruelty. The two cases Hay mentions are attempted murder and unnatural (sexual) practices. A separation could be granted in the worst kind of leprosy, though the marriage debt still had to be rendered if demanded by the diseased person. 2

#### 3.4.2. Separation for adultery.

The justification for a separation on the grounds of adultery was that a person could be justly punished in that domain in which he sinned. Adultery was a sin against the marriage bond, a breaking of faith with your spouse to whom you had given power over your

1. Hay. 'Lectures'; 83.
2. Hay. 'Lectures'; 69.

body, as you had given your body to another. Since you had the right to ask for the rendering of the marriage debt before your adultery, you could be justly deprived of it by a separation from bed and board. 1 Similarly, it was the prerogative of the innocent party to sue for a separation - the adulterer's suit would not be heard. This was because

"divorce was introduced for the advantage of the innocent party and in condemnation of the guilty. ... if the bond were broken by divorce this would be more to the advantage of the guilty than of the innocent, since once the divorce is granted he is able to choose a more attractive marriage, for example with the adulterer or adulteress." This was why permission was not granted to remarry while the other party was alive. 2

The innocent party not only had the right to sue, but in some instances a duty to do so. The major consideration was the salvation of the sinner. A divorce should not be demanded "in a fit of vindictiveness" nor to obtain the dowry. The petition should be presented

"out of zeal for justice, for the correction of the fornicator, to safeguard the good name of the innocent party, to see that the crime does not go unpunished and to guard against uncertainty as to the childrens parentage". 3 The most important point was whether the adulteress could be made to change her ways or not; whether she would go from bad to worse if kept on, or be a source of scandal. If the husband feared for his own continence he had to keep his adulterous wife. The decision to petition for divorce or not was decided in favour of whichever option would be the most likely to bring the adulterer

1. Hay. 'Lectures'; 61.
2. Hay. 'Lectures'; 61, 67.
3. Hay. 'Lectures'; 61.

back to reason. 1

There were seven circumstances in which canon law denied the right of the innocent party to sue for divorce. The most important was where both committed adultery of the same kind "since crimes of the same kind cancel each other out". This principle of recrimination was applied to where the innocent party committed adultery after the decree of separation and the divorced person asked for a reconciliation. The formerly innocent party had the options of a reconciliation, the reception of sacred orders, or a religious profession. But if he did none of these, the ecclesiastical judge had to withdraw the original decree and compel a reconciliation. In cases where the wife acted in good faith, believing her husband to be dead, a separation would not be granted. Nor in cases where "the husband knowingly and freely forgives his adulterous wife by having intercourse with her, or by continuing to live with her as man and wife, knowing her to be an adulteress." 2

Throughout Hay's discussion of separation and adultery, he speaks of it in terms of the innocent husband and the adulterous wife, largely no doubt for ease of language. In principle husband and wife were judged equal in divorce cases and a wife could demand a divorce in exactly the same way as a husband. Yet in the following passage, Hay qualifies this in such a way as to suggest a double standard of morality:

"an innocent wife does not normally petition for divorce because of her husband's adultery, nor is she bound to, as a man is because of his wife's adultery, because a woman has no power to correct her husband by words and blows, as the husband can correct his wife,

1. Hay. 'Lectures'; 63, 65.

2. Hay. 'Lectures'; 61, 63, 69.

because there is less danger of scandal arising among the people from the man's action than the woman's, and there is less danger of doubtful parentage of the offspring. In every case where the man can keep his adulterous wife, indeed in several more, the innocent wife may keep her adulterous husband, because she is weaker and in need of many things, always provided there is no scandal and she does not condone his sin, for she can only correct her husband by words and not by blows." <sup>1</sup> These are pragmatic reasons not based on theology. A 'divorced' woman did not fit into the usual social arrangement - the family. Although she could expect some form of settlement (eg. the return of her dowry) to give her a means of support, she would not have a husband to manage her property or represent her in the wider responsibilities of a property owner. If the couple were not part of landed society, the wife's position would be precarious without any independent means of support. A 'divorced' woman would probably require support from her kin, even if she had sufficient means to maintain an independent household. A wife's adultery was considered more scandalous because it placed inheritance in doubt. The rightful heirs of a man might be defrauded of their true inheritance if a wife passed off as her husband's child, one that was conceived in adultery.

### 3.4.3. Analysis of 'Liber Officialis'.

It is almost impossible to find out how these principles were applied in practice. The main source of information is the 'Liber Officialis of St. Andrews'. The editor of this selection of cases, Cosmo Innes, believed that the sentences in so far as marriage was concerned, harmonised with the canons of the Church, and that divorces formed the greater part of the actions relating to matrimony. <sup>2</sup>

1. Hay. 'Lectures'; 65.
2. 'Liber Officialis'; xii-xiii.



Table 1 ANALYSIS OF 'LIBER OFFICIALIS'

	Archdeaconry of Lothian 1515-1552		St. Andrews 1541-1544		TOTALS	
	No.	%	No.	%	No	%
Suits for nullity:						
1. Consanguinity	24	19	6	14	30	18
2. Affinity	50	40	12	27	62	36
Total kinship	74	59	18	41	92	54
3. Pre-existing marr	16	13	0	-	16	9
4. Other causes	10	8	4	9	14	8
Total nullity	100	79	22	50	122	72
Suits for separation:						
5. Based on adultery	7	6	4	9	11	6
6. Based on sevitia	1	*	4	9	5	3
Total	8	6	8	18	16	9
Total divorce suits	108	86	30	68	138	81
7. Other suits	8	6	9	20	17	10
8. Unclassified cases	5	4	4	9	9	5
9. Cases not in digest	5	4	1	2	6	4
Totals	126	100	44	100%	170	100

(\* less than 1%)

A crude analysis of the cases, based on the digest, does reveal certain important points (see Table 1). It shows for the data used that:

1. divorce suits formed the greater part of the cases involving matrimony;
2. most divorce suits were for nullity based on diriment impediments;
3. most divorce suits were based on prohibited degrees;
4. in the cases concerning kinship, the ratio of those based on consanguinity to those based on affinity was about 1:2. 1

Perhaps these figures show that the Archbishop of St. Andrews was partly justified in his petition to the Pope (1554). He stated that such were the connections between families in Scotland, that it was scarce possible to match two persons of good birth who were without the forbidden degrees; and on that account many married without dispensation, promising to obtain it subsequent to marriage, but afterwards instead of doing so, sought a divorce, or put away their wives on the pretext of the want of dispensation and the expense of procuring one. 2

#### 3.4.4. Dispensations.

The existence of an impediment did not automatically mean that a marriage was invalid. Even with diriment impediments a dispensation could be obtained if it was within the Pope's power either before the ceremony to make the parties lawfully capable of contracting marriage, or afterwards so that matrimonial consent could be renewed and the children legitimised. Dispensation was "a relaxation or interpretation of the law", "by relaxing the law in whole for everyone, or in part,

1. For a detailed explanation of the method of analysis see app 1.4. The digest of cases is in 'Liber Officialis', 1iii-1v.
2. 'Liber Officialis'; xxv-xxvi.

for some individual". Only the person with authority over the law could dispense: nobody could grant a dispensation from natural or divine law. The Pope under his own power given him by God could dispense from the laws made by himself or his predecessors. Certain circumstances justified the relaxation of the law for an individual. 1

The first consideration was the canon law equivalent of equity: "Anyone who wishes to interpret a law must consider whether the legislator, were he present, would wish the law to be binding in such a case, or if a prudent man were asked, he would consider the case an exception to the general force of the law." 2 The other two (taken by Hay from Richard Middleton) were based on the final test of any law in this theocentric system; every human action was referred for its validity to whether it secured perpetual happiness in God's presence after death. A dispensation could be lawfully given to obtain "the greater good or benefit either for the community or for the person himself" or to prevent "a great evil to either." 3 However, the person who was dispensed might still have to undergo some kind of penance, especially if the dispensation was obtained after an invalid marriage. In theory considerable flexibility was given by the system of dispensation to those parts of the canon law which were not natural or divine.

The protocol books give several examples of parties seeking and gaining dispensations. There are memorandums recording the appointment of procurators or commissioners to plea for parties seeking dispensations from the forbidden degrees. 4 In some marriage

1. Hay. 'Lectures'; 285.
2. Hay. 'Lectures'; 285.
3. Hay. 'Lectures'; 289.
4. 'Prot. Bk. Gaw'; 19, no.82 (1551):  
'Prot. Bk. Johnsoun'; 35, no.178 (1539).

contracts provision is made for obtaining a dispensation if it was found to be necessary, either before or after the marriage. When Andrew Lang entered into a contract of espousal with Agnes Crawford, he promised that if he brought

"forward any reasonable cause in a suit of divorce between him and the said Agnes, he shall pay all expenses both at the Roman Court and without; and if divorce be granted he shall within twenty days receive and have the said Agnes for his wife and enter into a new marriage with her." 1

There are also several instruments narrating the presentation of dispensations to the Church authorities for absolution from the sentence of excommunication; all these marriages are sanctioned despite being within the forbidden degrees. 2

### 3.5. Impediments.

#### 3.5.1. Impedient and diriment impediments.

The impediments to marriage were usually divided into two categories in Canon Law. Hay distinguishes between them in that an impedient or prohibitive impediment was one "which merely impedes the contracting of marriage .... so that marriage cannot be contracted lawfully without sin, but if it is contracted it is valid". A diriment impediment was one that "impedes the contracting and nullifies the contract .... so that marriage cannot be contracted lawfully and if it is contracted, it is not valid". 3

Seven impedient impediments were usually enumerated. Hay summarised these as -

1. 'Prot. Bk. Johnsoun'; 44, no.224 (1540).  
See also: 'Prot Bk. Cristisone'; 86, no.377 (1544);  
'Prot Bk. Rollok'; 33-34, no.112 (1551).
2. 'Prot. Bk. Carruthers'; 46, no.135 (1550);  
'Prot. Bk. Corbet'; 18, no.75 (1552);  
'Prot. Bk. Johnsoun'; 3, no.15 (1530);  
'Prot. Bk. Johnsoun'; 77, no.379 (1557).
3. Hay. 'Lectures'; 47.

"Incest, abduction of a spouse, death of the woman, standing for one's own child, death of a priest, public penance, or marrying a nun; all these impede the union of matrimony."

Such an impediment could be removed by dispensation before a wedding under certain circumstances, so that the marriage was contracted without sin. Hay recommended that it was safer to obtain a dispensation of a bishop, though he recognised that some canonists had argued that any priest with the cure of souls could dispense, provided he had the power by custom. 1

Several points should be noted. Incest had a different emphasis in that it referred only to affines: incest was intercourse after marriage with a relative of the wife, whereby the husband could not marry that that relative after the death of his wife. The husband also lost the right to ask for the marriage debt. Abduction referred to another man's betrothed as well as to his wife. An exception to wife murder was when she was found in adultery. A person who underwent public penance was meant to remain unmarried because such people "ought to bewail their sins". Hay commented that "Some say this is a counsel, not a precept". It seems unlikely that this impediment was enforced. 2

Diriment impediments can be reduced to defective consent, and those arising from an incapacity for marriage, either generally in one of the parties or a mutual incapacity based upon some antenuptial relationship existing between the parties. Hay has another verse to help his pupils remember the diriment impediments:

"Error, condition, vow, relationship; crime, disparity of worship, force; order, marriage bond, propriety; if there is affinity, if

1. Hay. 'Lectures'; 47,49. The verse probably comes from P Lombard.
2. Hay. 'Lectures'; 47,49.

perchance you cannot come together, these forbid marriage and make it void." 1 The number of diriment impediments distinguished varied as the categories were not exclusive, being connected through symbolism and analogy, or by logical reduction. Four of these impediments - consanguinity, affinity, spiritual relationship, and 'force and fear' - are discussed below in more detail. Several points are worth considering in relation to the other diriment impediments.

Error referred to the identity of the person or their freedom. If you were mistaken as to the person you were marrying, your consent was defective and the marriage void. Similarly your consent was not held to be true if you married someone of a servile condition if you believed them to be a free man or woman. Errors of fortune or quality did not prevent the contracting of marriage. 2

The impediment of legal adoption arose from the kinship ties created by adoption. These were

"between the adopting father and the adopted son, secondly the natural son of the adopter and the adopted son, thirdly between the adopting father and the adopted son's wife, and fourthly between the adopted son and the adopter's wife".

Hay deliberately dealt briefly with this impediment and omitted much detail since "this adoption is not in use among our people." 3

'Qualified adultery' was another name for the impediment of 'crime'. As has already been noted, an adulterer could not divorce his innocent spouse and marry his paramour. Even if the innocent spouse was granted a divorce, the adulterer could not marry while she was alive as the

1. Hay. 'Lectures'; 49.
2. Hay. 'Lectures'; 49, 51, 53.
3. Hay. 'Lectures'; 229-235, 239, 243.

marriage bond (another diriment impediment) was dissolved only by death. The impediment of 'qualified adultery' was a safeguard against the incentive in these circumstances to hasten the death of the innocent party. Marriage was forbidden in cases where it could be inferred that an adulterous spouse contrived, or wished to hasten, the death of the innocent party. It illustrates the general principle that none should profit from their crime. 1

The problem of public propriety is more subtle as the circumstances which gave rise to it were very similar to one of the proofs of marriage - promise plus subsequent intercourse. A betrothal created a kinship relationship of affinity which nullified matrimony and betrothal to four degrees. It arose from ~~a~~valid betrothal without subsequent intercourse, or when a man attempted to have intercourse with any other woman with conjugal intent and nothing happened. If intercourse took place after a betrothal, this created the impediment of affinity and also gave grounds of a legal suit claiming a presumption of marriage. Even if a betrothal was dissolved, the fiance was barred from marrying his ex-fiancee's relatives to the fourth degree. 2

Impotence was applied to a varied range of circumstances, which included incapacity owing to age, male castration, smallness in the woman and deficiency of the mind. These were all reasons for an inability to perform intercourse. The emphasis was on the man as "in order that the parties be considered as potent no mingling of seed is necessary, but emission within the proper vessel is sufficient". Thus, a woman's frigidity did not prevent the contracting of marriage or nullify the contract. It was necessary for a man's frigidity to impede a marriage for it

1. Hay. 'Lectures'; 59-75.

2. Hay. 'Lectures'; 57, 211, 213.

"to be antecedent to the celebration and consummation of the marriage, so serious that intercourse with another cannot take place at all, and permanent and incurable by any lawful artificial means without serious danger to the body".

A marriage was not invalidated by impotence subsequent to its contraction. The same conditions applied to smallness in the woman or castration. 1

The impediment of impotence differed in one important aspect from others as an annulment on the grounds of impotence in its strict sense effectively prohibited the impotent person from ever enjoying a valid marriage:

"no permission is ever given to a frigid person to marry any other woman once the divorce (annulment) has been granted. If he does marry a woman and has intercourse with her, he must be compelled to return to the first, since the Church was deceived in granting the divorce, for she judged that the frigidity was permanent, whereas it was merely temporary."

The exception was bewitchment which

"prevents marriage, even though permanent, is particular and relative to one woman, or several, but not all. For if it were relative to all it should be called frigidity rather than bewitchment. Hence after the divorce (annulment) a victim of withcraft is given permission to marry another with regard to whom he is not be\_witched". 2

Non-age was sometimes classified as a form of impotence. A marriage could be annulled if it was made 'per verba de praesenti' without subsequent intercourse by a girl before the age of twelve years, or by a boy before the age of fourteen. These ages were taken from Roman Law: the 'Institutes of Justinian' (533A.D.) confirmed the recently promulgated age of males, and retained the old rule for the marriageable

1. Hay. 'Lectures'; 105, 111, 117.

2. Hay. 'Lectures'; 129.



age of women. 1 This was not a hard and fast rule, and an annulment depended on the merits of a particular case:

"For the age of marriage is not determined for its own sake, but also in relation to capacity for intercourse, the use of reason and ability to fulfil the duties of marriage, all of which usually develop at that age, and the law always provides for what usually happens. We say in particular that all these usually develop at the age because sometimes malice makes up for the lack of age, in the sense that in some cases the natural vigour and capacity for intercourse, as well as the use of reason, develops before puberty and the ages mentioned. Thus if a girl has successful intercourse with several men before her twelfth year, or a male has had relations with several women before his fourteenth year, if they freely contract marriage they should not be separated, provided they are not insane and have the use of reason." 2 There was as much emphasis on the use of reason as on the ability for intercourse.

### 3.5.2. Consanguinity

Consanguinity was the diriment impediment of blood relationship, and was restricted to the fourth degree by the fourth Lateran Council (1215). 'Blood' because conception was interpreted as the mingling of seeds, semen being purest blood joining with female blood, whose 'reservoir' was changed periodically by the issuing forth of corrupt blood. Consanguinity was based on natural law (in the direct line and siblings), on divine law (parents and children), and on canon law (to the fourth degree). 3 The ruling of the Council was incorporated into local Canon Law. The Synod of Aberdeen, circa 1217-1300, ordained that:

"let priests intimate to their parishioners that marriage is

1. Lee. 'Roman Law'; 99. 'Institutes', Bk.I, Tit. XXII.
2. Hay. 'Lectures'; 113.
3. Hay. 'Lectures'; 201, 205.

prohibited within the fourth degree of consanguinity or affinity, beyond the fourth degree it is lawfully contracted." 1

The fourth degree was not chosen because of any divine injunction or natural prohibition. It was based on the assumption that "the secondary end of marriage is the association of men and the multiplication or increase of friendship" and "it was reasonable to restrict marriage to those degrees of consanguinity beyond which there does not seem to be any carnal love or friendship". According to Hay, in the early days of the Church 'friendship' was maintained longer than was the case when Innocent III became Pope. It was thus reasonable to change the restriction from seven to four degrees. To Hay it seemed that "family ties in many cases cease altogether at the fourth degree, in some indeed at the third, and in others at the second degree". The reason was that "charity has grown cold in many people and the love of family has become tepid too". 2

The tree in figure 3 shows how extensive was the prohibition. The Roman numerals are the canonical degrees, the Arabic those of civil lawyers. The number of degrees are the same in the direct line, but different in the collateral lines as canonists computed according to blood, the civil lawyers by succession. In canon law there were as many degrees as generations, the relationship being counted from the common ancestor, who did not constitute a separate degree. In the collateral or transversal lines, the situation could arise where the lines of descent were unequal. Equal lines were those in

"which the persons, each in his own line, are equally distant from the common stock, for instance two brothers or sisters, and the sons of two brothers. Otherwise the lines are called unequal, for example a brother

1. 'Statutes'; 39, no.66.

2. Hay. 'Lectures'; 193, 207.



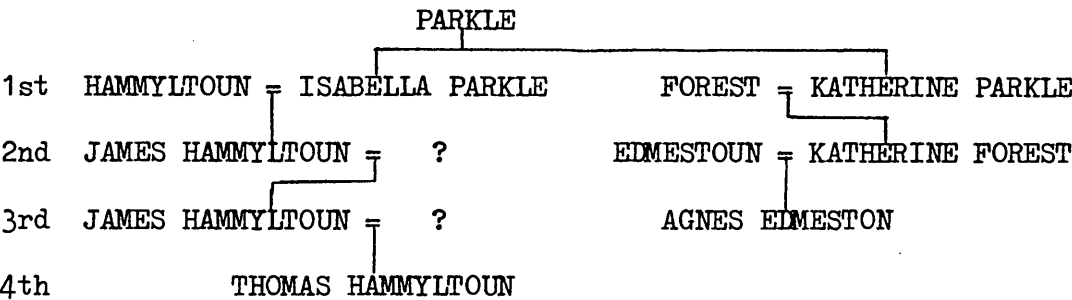
and his brother's grandson."

In such cases the more distant line was used for calculating the degree of relationship. 1 Descent need not arise from marital intercourse. Consanguinity was a 'blood' relationship which originated in sexual intercourse, whether it took place within or without marriage. This was applied in a similar manner to the relationship of affinity. 2

Perhaps it is easier to see how the relationships were calculated if an example is used. In 1539 a commission was granted by Thomas Hammiltoun and Agnes Crawford to several people to seek a dispensation from the commissary of the Apostolic See of St. Andrews for their marriage. Figure 4 shows how their descent was traced, and that they were within the fourth degree of consanguinity. 3

Fig. 4.

Degrees



The Pope had the power to grant dispensations for marriage in the second, third, and fourth degrees as these were prohibited by his own law, and not divine nor natural law. Despite this, Hay believed that the children of such marriages and their parents died young.

1. Hay 'Lectures'; 189, 191, 197, 199.  
2. Hay. 'Lectures'; 187.  
3. 'Prot. Bk. Johnson'; 35, no. 178.  
See also: 'Prot. Bk. Gaw'; 19, no. 82 (1551).

The same principle of

/dispensation applied to the relationships mentioned in Leviticus 18, whose legal precepts had been outdated and abrogated by the law of the Gospel. But the Pope could only dispense the brother's wife and the wife's sister as the other relationships included in that chapter were forbidden to marry by the law of nature. The other relationships were: mother, step-mother, sister, daughter-in-law, step-daughter, granddaughter, step-son's or step-daughter's daughter, aunt (extended to great-great), and uncle's wife (extended to great-great). 1

### 3.5.3. Affinity.

The same statute of the Synod of Aberdeen which incorporated the fourth Lateran Council's ruling on consanguinity, also included the diriment impediment of affinity (see quote above). Marriages were forbidden within the fourth degree of affinity. 2

Affinity was a bond between person and person which had as its remote cause consanguinity, and its proximate cause carnal intercourse. Affinity did not produce affinity

"because it is always necessary for the person through whom affinity arises to be a blood relation of one of those whose affinity is in question. For anyone to become related to me by affinity he must be a blood relation of a woman with whom I have had intercourse, or I must be a blood relation of a woman with whom he has had intercourse". 3 Thus there was no affinity between the relatives of a married couple, nor between the couple themselves whether married or not.

It was not necessary for the couple to be married, and, as with consanguinity, the relationship arose from any intercourse -

"whether it is performed lawfully or unlawfully, naturally or

1. Hay. 'Lectures'; 207, 209.
2. 'Statutes'; 39, no.66.
3. Hay. 'Lectures'; 245.

unnaturally (succubus and incubus), provided the male seed is received into the proper vessel". 1

There was no special method of reckoning degrees of affinity and they were counted according to the degrees of consanguinity:

"if you want to know in what degree somebody is related to you by affinity, you must find out what degree of consanguinity there is between you and the person because of whom you contracted affinity with the first person. He will be related to you in exactly the same degree of affinity as the degree of consanguinity". 2

The extent of the prohibition is shown below (figure 5), which is adapted from Hay. 3

Fig.5. TREE OF AFFINITY.

A	B	C	D	E
Dead Sister's Husband	Sister	FIRST  DEGREE	Brother	Dead brother's wife
Sister's daughter's husband	Sister's son or daughter	SECOND  DEGREE	Brother's son or daughter	Brother's son's wife
Sister's granddaughter's husband	Sister's grandson or granddaughter	THIRD  DEGREE	Brother's grandson or granddaughter	Brother's grandson's wife
Sister's great- granddaughter's husband	Sister's great- grandson or granddaughter	FOURTH  DEGREE	Brother's great- grandson or granddaughter	Brother's great grandson's wife

1. Hay. 'Lectures'; 219, 213.
2. Hay. 'Lectures'; 215.
3. Hay. 'Lectures'; 243.

Column C gives the degree of consanguinity between persons in columns B and D, and hence the degree of affinity for those persons in the same line. Affinity was contracted between persons in column A and B, A and D, E and B, and E and D. There was no impediment between people in columns A and E; a sister's widower was lawfully capable of marrying his sister's brother's widow. As there was no impediment between a husband's and a wife's relatives, two brothers could marry two sisters, and a father and son could marry a mother and daughter. Step-relatives were equated with the same degree as 'actual' relatives because the "same respect should be shown to a stepmother ... and to a stepfather ... as to one's own mother and parents". 1

The Papal power of dispensation for affinity was similar to that for consanguinity. The Pope could not dispense from the first degree in the direct line because the prohibition was established by natural and divine law. He could dispense, however, from the first degree in the collateral line as this was allowed in the old law and not forbidden by the new - thus a brother could be granted a dispensation to marry his brother's widow. 2

#### 3.5.4. Spiritual relationship.

The diriment impediment of spiritual relationship was summarised in a thirteenth-century statute of the Synod of Aberdeen:

"We interdict marriage between godfathers and godmothers, and between a son and a daughter (of godparents), and between a godchild male or female and a son or daughter of a godparent." 3

This impediment was permanent, and was not removed by the death of

1. Hay. 'Lectures'; 221.

2. Hay. 'Lectures'; 221. Hay supported the Papal argument that Henry VIII's marriage with Catherine of Aragon was valid.

3. 'Statutes'; 39, no.66.

the person who was the origin of the relationship. Spiritual relationship, however, arose in a different manner than consanguinity or affinity because it was not based on sexual intercourse. A spiritual relationship ~~was~~ the bond of love resulting from the fact that you had baptised, confirmed or received another at baptism or confirmation. It arose from the analogy between carnal generation and birth into a state of grace:

"For the person baptised and confirmed these two Sacraments are like two births, birth in the womb and from the womb. For as the offspring receives its essential existence by carnal birth in the womb, that is by conception and animation, so by Baptism the offspring receives existence in grace. As the offspring receives strength and increase in the eyes of men by birth from the womb, so the confirmed person receives power and grace to profess the name and faith of God boldly in thought, word and deed." 1

The tree in figure 6 shows the subsequent relationships and the impediments. The parts played in the ceremonies were -

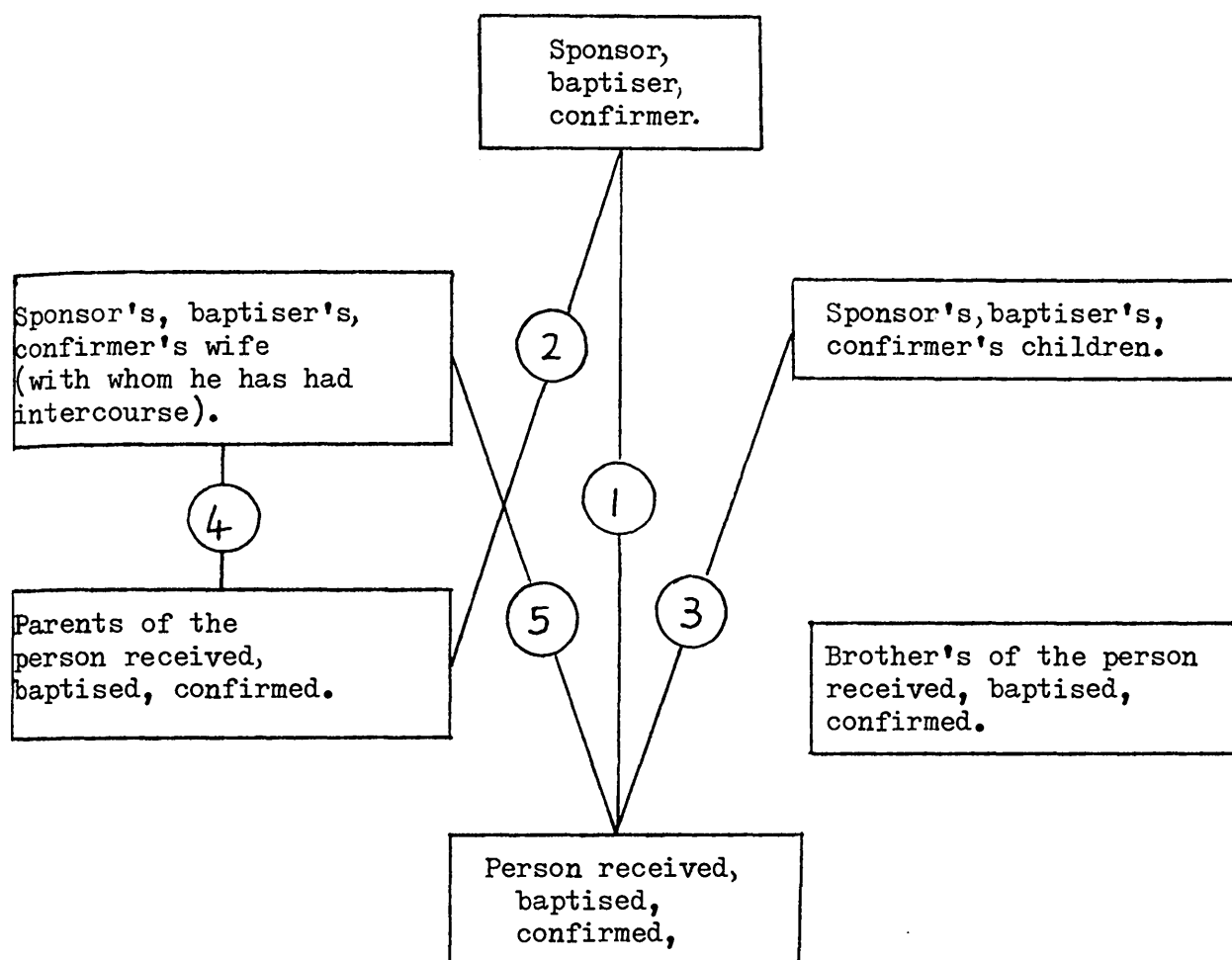
"the receiver or sponsor is the man or woman who holds the child at Baptism or Confirmation, or is present at the Baptism and touches the child's head as the custom is in these parts. The baptiser is the one who pronounces the words which are the form of Baptism, and does all the other things. The confirmer is the bishop who anoints and pronounces the words of Confirmation. The person received or baptised is the child who is baptised, the person confirmed is the child who is confirmed." 2

Paternity was the impediment existing between the godparents and the godchild. The relationship was only passed on to the wife of a godfather if they had had carnal intercourse previous to the baptism. If he married

1. Hay. 'Lectures'; 223.
2. Hay. 'Lectures'; 247.



Fig. 6. Tree of Spiritual Relationships. 1



1. Spiritual maternity, paternity and sonship.
2. Comaternity and commaternity.
3. Spiritual brothers and sisters.
4. Co-fathers and co-mothers.
5. Spiritual mothers and sons.

after the ceremony, or had had no carnal intercourse with his wife, the spiritual relationship was not contracted between the wife and the god-child. Unlike consanguinity and affinity, the relationship was not extended by fornication according to the "common opinion of the doctors":

"The reason is that the cause whereby this sort of relationship is contracted is the unity of the flesh, which does not exist between a fornicator and his woman as it does between a man and his wife." 1

'Unitas carnis' was part of the sacramental nature of marriage and was derived from the marital relationship and not the physical act of intercourse.

Copaternity existed between the carnal parents and the spiritual parents, and it was immaterial whether the child was legitimate or not. 2

Co-brotherhood and co-sisterhood was more limited than might appear. A person's spiritual children could not marry his carnal children, even if they had been born after the ceremony. But the siblings of the spiritual children could marry the carnal children of their brother's or sister's spiritual parents; and marriage could be contracted between the spiritual children of the same spiritual father, otherwise

"it might be impossible to find anybody in the whole parish capable of contracting marriage, if they were all baptised by one and the same priest, and in a whole diocese if the bishop confirmed them all." 3

### 3.5.5. 'Force and fear'.

The only other diriment impediment which will be dealt with here, is that of force and fear. One of the central principles of Canon Law was that free consent was an essential of marriage. However, the degree of

1. Hay. 'Lectures'; 223, 225.

2. Hay. 'Lectures'; 227.

3. Hay. 'Lectures'; 227, 229. There is only one suit for divorce on the grounds of a spiritual relationship in the 'Liber Officialis' - case no. 156.

pressure needed for a marriage to be annulled was defined narrowly. It had to be force rather than persuasion; fear out of respect for your parents or guardians was insufficient, whereas force exercised by them could be grounds for nullity. Just fear "was that capable of affecting a strong-minded man". It could only be subsumed by the free consent of the person who contracted marriage because of fear; even

"subsequent carnal copula, provided it is not done with marital intent, or long cohabitation, giving of gifts, embraces, kisses and the like, if they are not done with free and marital intent, do not make marriage in the forum of conscience." 1 The person threatened had to have chosen marriage as the lesser of two evils. The force necessary for an annulment was that

"caused when a person able and accustomed to do such things threatens death, ruin, extreme bodily harm, disinheritance or loss of some inheritance or property, slavery, rape, or any other grave and really appalling outrage, .... not merely if one is threatened with them oneself, but also if one's children, wife, parents or beloved relations are threatened with them." 2

An example where this impediment probably could have been applied, is the incident where Janet Lawsoun was ravished by James Wardlaw, while on her way to Edinburgh from Leith with her mother. She was taken "to Waristoun and forced to handfast and marry the said James. She remained 'in subjection' until, on 'this Sondag at evin', she 'with gret difficulte eschaepit'." She rejected the "pretendit marriage" and required the help of various relatives and her "antis husband". 3

Parental consent was not a requirement for a marriage to be valid, and a couple could contract a valid marriage after eloping. As with

1. Hay. 'Lectures'; 87, 89.
2. Hay. 'Lectures'; 85, 87.
3. 'Prot. Bk. Young'; 445, no. 2081 (1515).

marriage in church it was a matter of propriety -

"that the wife's hand should be asked <sup>f</sup>om those who appear to have charge over her and power to bestow it, is not of the essence of the Sacrament but a matter of propriety, since it is not fitting to contract marriage when the parents are unwilling." 1

The same principles applied to betrothals and it is not inappropriate to cite a betrothal to illustrate a case in which great care is taken to emphasise free consent. Christiana Pennycuk denied that Edmund Rutherford had taken her away violently. Edmund "had often asked her in marriage from her father, her kindred and friends". On their refusal Christiana, "for love and with a view to marriage", had appointed a place and time for him to come and take her away. He did so, and Christiana went with Edmund of her own free will, and was lawfully betrothed to him. The account repeatedly stresses that Christiana's actions were of her own free will, and that she was not subject to 'force and fear'. It was she who arranged the elopement, and this was only after her father had rejected Edmund's suits. Her parents accepted what had occurred - there were no legal grounds on which to annul the betrothal or prevent the marriage - and a settlement of property was arranged. 2

### 3.6. Postscript.

The Reformers accepted many of the principles of Canon Law outlined above and the main body of this thesis traces the changes made from the Reformation to 1707. The theological concept of 'unitas carnis' remained important although the indissolubility of marriage except by death was compromised by the introduction of divorce 'a vinculo'. The Reformers and

1. Hay. 'Lectures'; 35.

2. 'Prot.Bk.Young'; 60-61, nos 259-261 (1489).

their successors were equally insistent on the public celebration of betrothals and marriages, and on the proclamation of banns. After some wavering they also accepted that parental consent was not necessary for a marriage to be valid - the validity of a marriage still depended on the free and mutual exchange of consent by the couple. 1 The new laws on incest drastically curtailed the extent of the forbidden degrees, although the principle that kinship could be established by intercourse alone was retained. The impediment of spiritual relationship disappeared and is not even mentioned in the sources used. The Reformers' inheritance from the Canon Law on divorce 'a mensa et a thoro' is more complex, but included the concept of divorce as punishment. This partly explains the doubt about whether divorced adulterers could remarry. One major change, which is not considered in this thesis, was the abolition of clerical celibacy.

1. eg. Robinson. 'Original Letters'; 315-316, cxlvii.

#### 4. THE CELEBRATION OF MARRIAGE: 1560-1700.

##### 4.1. Temporal Regulations.

The only temporal regulation imposed by Canon Law and mentioned in the few sources used, was that forbidding marriages during Lent. The Council of Trent in 1563 reiterated the law by enjoining that

"the ancient prohibitions of solemm nuptials be carefully observed by all, from the Advent of our Lord Jesus Christ until the day of Epiphany, and from Ash-Wednesday until the octave of Easter inclusively; but at other times it allows marriages to be solemly celebrated". Its condemnation as "tyrannical superstition, derived from the superstition of the heathen" was declared anathema. 1

The Reformers rejected this traditional prohibition and introduced their own restrictions.

##### 4.1.1. Prohibited seasons.

The Reformers rejected the traditional Christian year and holy days. This included the ban on marriages in Lent. In practice, however, few marriages were celebrated during this period. Foster, for instance, says that for the period 1600-1638 "Only rarely did a marriage take place during Lent". 2 This practice may show that the Canonical prohibition coincided with other reasons for not marrying in Lent. Marriage was, for instance a time of celebration which included feasting: the end of the winter would not be the most suitable time of year to slaughter cattle and use grain.

The Church of Scotland, however, did forbid marriages on days appointed for fasts and public humiliation. This ban does not appear in the 'Book of

1. 'Trent Canons'; 195-196, 204.
2. Donaldson. 'Scottish Prayer Bk'; 18.  
Donaldson. 'Scottish Reformation'; 180.  
Foster. 'Ecc. Admin'; 133.

Common Order' nor the first 'Book of Discipline'. The reasoning behind the ban is revealed in the disciplining of Constantine Meliss and Isabel Elder by the Kirk Session of Perth in 1581. They were ordered to make public repentance on the following Sunday and pay £4 to the poor

"because in time of our public humiliation and fasting they passed up at once to their feasting and solemnizing of marriage, contrary to all good order." 1 Obviously the festivities and light-hearted celebrations of a marriage conflicted with the requirements for a solemn fast. The same could be said, and was, of marriages on Sundays.

The regulations probably continued to be applied in the 17th century. The 'Directory' of 1645 stated that marriages should be solemnised "at some convenient hour of the day, at any time of the year except on a day of public humiliation". 2 The Synod of Sutherland and Caithness in 1710 admonished a minister for performing a marriage on a Fast day. 3

#### 4.1.2. Day of the week.

The days of the week on which marriages could or could not be solemnised was not a simple issue: it was drawn into the long-running controversy over Sabbath observance. J.K.Carter in his article on Sunday Observance traces the changes in the dominance of different views in the Kirk Session of St.Andrews. He showed in particular how the enactments of the kirk were effected by particularly influential individuals, like David Black. It is not proposed to study marriages on a Sunday in similar detail, or with such precision in distinguishing between the different opinions. Attention will be drawn to the statements made on behalf of the 'Church of Scotland', and illustrations given of the differing views held by kirk sessions.

1. 'K S Reg. Perth'; 240.
2. 'Directory'; 313.
3. Graham. 'Ecc Disc.'; 196.

The wide spectrum of views can be characterised as falling into three broad categories (although this is an oversimplification):

1. Sabbatarian: the Lord's Day should be observed strictly, and therefore, marriages on a Sunday should be discouraged as the secular celebrations were likely to lead to Sabbath breaking.

2. Anti-Sabbatarian: Sunday was a day of greater significance than the other days of the week, and was thus particularly suited for marriages.

3. Catach<sup>etic</sup>/al: the restrictions applied during times of preaching no matter what day of the week. Marriages were appropriate on any preaching day.

The first 'Book of Discipline' specified the time of marriage in two places. In the 'policy of the Church' it was laid down that "Before noon, must the word be preached and sacraments ministered, as also marriage solemnised, if occasion offer". The day is not specified - Sunday only being one of several preaching days. In the ninth chapter 'of marriage' was included: "The Sunday before sermon we think most convenient for marriage, and it to be used no day else without the consent of the whole Ministry". 1 The use of 'think' rather than 'know' or 'ought' shows that the authors recognised that there were differing views. Their decision was based on 'convenience' rather than scriptural injunction, and hence could be altered. The possibility of this is emphasised by the statement of the authority for such a change - the consent of the whole ministry.

The issue was not apparently raised in the General Assembly until 1567. The minister of Ratho, Patrick Craigh or Creich, was suspended from his ministry for celebrating a marriage,

"without proclamation of bands or a testimonial therof, and upon a ferial day, contrair to all order established in the Kirk, and chiefly ane Act made in December 1565". 2 The act referred to concerned the

1. 'Bk. of Disc.'; 312, 318.

2. 'B.U.K.'; I. 114, 126. For the act see 'B.U.K.'; I, 72.



proclamation of banns and testimonials. From this case it could be assumed that the Assembly still upheld the view that marriages should be solemnised on a Sunday.

A similar complaint was laid against Master John Row in 1573. He had solemnised a marriage "without proclamation of bands, and, in like manner, out of dew time, viz. on a Thursday at afternoon prayers". His reply shows that his kirk session was ignoring the recommendations of the 'Book of Discipline'. Row answered that "he did nothing bot the command of the Sessioun of his Kirk and my Lord Ruthven, ane speciall ane of the elders of the said Kirk". This plea may have had some effect as he was disciplined only for marrying people without proclamation of banns or testimonials. The General Assembly - as it may have done in 1567 - avoided tackling directly the problem of on which day marriages should be solemnised. It was either left unresolved or ignored, or included as one of the subjects to be taken up by the Superintendent of Strathern with Row and the St. Johnston (Perth) Kirk Session. The Superintendent was meant to report the order he took to the next General Assembly, but this is not recorded in the Assembly records. 1

By 1579 there was within the General Assembly sufficient consensus to change the recommendations of the 'Book of Discipline'. The move was initiated by two similar questions posed by the Synod of St. Andrews. The first was -

"If all the Kirks have not the same equall power to marrie on ane oulk day, by the Sabbath, haveand ane sufficient number, and joinand preaching therto, as certain particular Kirks already practises the same." The Synod is challenging the right of the Assembly to regulate all kirks and is arguing for a degree of local autonomy. They stress the requirement

1. 'B.U.K.'; 256, 261-262.

to have a sufficient number of witnesses, and solemnisation in front of the congregation. The Assembly answered: "It is aggreit that they may marrie on feriall days." The second question (or possibly an alternative version of the first) was argued on different lines:

"Becauss there are some Ministers that will not solemnize marriage, but only upon Sunday; and other some use the samen upon oulk dayes, whereof ariseth no small slander among the people: we crave an universal order to be keeped, either to appoint the Sunday precisely, or that all days be alike after due proclamation."

The grounds here are a desire for uniformity, either only on a Sunday or any day of the week, because of the disrepute differing opinions had brought down on the Church. The Assembly's answer was similar to that of the first question, and included the condition implicit in the first:

"Bands beand thrie severall Sondagis lawfullie proclaiuit, the marriage may be any day of the oulk solemnizat, swa that a sufficient number of witnes be present." 1 Neither of the answers restricts marriages specifically to preaching days, though it may have been assumed that the requirement for witnesses meant this in practice. Otherwise the Assembly would have ignored the principle that marriages should be solemnised in front of the congregation.

These decisions, however, did not settle the matter as in 1602 and 1610, the Assembly had to reiterate its decision of 1579. The order of 1602 concerned itself with another abuse as well - marriage at unusual hours - and shows that some ministers were not celebrating marriages in front of the congregation. Such irregularities were associated with clandestine marriages. The Assembly ordained:

"that no marriages be celebrate airlie in the morning, or with

1. 'B.U.K.'; II, 439-441. See also 'K.S. Reg. St.Ands' (1); 452.

candle light; and finds likeways, that it is leisum to celebrate the said band of mariage upon the Sabboth day, or any other preaching day, as the parties sall require and think expedient; and ordaines the same to be indifferentlie done; and that no riotousnes be used at the same upon the Sabboth day." 1 It is interesting that the decision specifically refers to preaching days and not just week days as in 1579. The Assembly also distinguishes Sundays as different from other preaching days by referring to Sabbath observance. These qualifications were omitted by the Assembly in 1610 when it statuted and ordained that

"the celebration and solemnisat[i]on of the holy band of matromonie, be refused to no Christians within this realme, neither upon Sunday, nor upon any other day, when the samine shall be required and ordaineth that the same be performed with all christian modestie, and without all disorder." 2 A distinction is not drawn between preaching days and week days, and Sundays are not specifically set apart from other days by the stricter observance of good order.

The controversy is not evident during the periods of Episcopal rule, nor in the records of the re-established General Assembly after 1691. Even in the Assemblies between 1638 and 1654 the only reference is in the 'Directory' of 1645. Marriage was to be solemnised at "some convenient hour of the day" and "we advise that it be not on the Lord's Day". 3 The absence of evidence, however, should not be taken to mean that a consensus had been established. Certainly on a local level the kirk sessions continued to try to regulate the day of the week on which marriages were to be solemnised. There continued also a prejudice against marriages on Sundays. The Kirk Session of Corstorphine in the late

1. 'B.U.K.'; III, 1002.
2. 'B.U.K.'; III, 1001.
3. 'Directory'; 313.

seventeenth century, for instance, tried to restrict marriages to Thursday, being the most convenient as it had been appointed for preaching, under pain of a £14 fine. The strength of local custom is shown by the fact that sixteen years later the same session noted that it was the parish custom to marry on Friday and ordained that Thursday be used in future. 1 Andrew Symson in 1684 recorded that Sunday marriages were unusual in Galloway -

"Their Marriages are commonly celebrated on Tuesdays or Thursdays. I myself have married neer 450 of the inhabitants of this country all of which except seaven, were married upon a Tuesday or Thursday. And it is look'd upon as a strange thing to see a marriage upon other days." 2

The danger of using the absence of material on Sunday marriages as showing the absence of Sabbatarian disputes is illustrated by the records of the Kirk Session of St. Andrews. The issue of on which days marriage should be solemnised is mentioned only three times between 1560 and 1600. In 1570 the Session ordained a supplication to be made to the civil magistrates

"for guid ordour to be takin in time cuming for reformatioun of the grite abuse usit be new mareit personis in violatioun of the Sabbath day; and in spetial quhen, the day of thair mareage after muin, they resor(t) nocht to hering of the doctrine, and at evin after supper insolentlie, in evil exemple of utheris, perturbis the town witht rynning thair throw in menstralie and harlatrie." 3 The session's main concern was the violation of the Sabbath day, and only noted absence from the hearing of doctrine, thus showing that it was the special standing of Sunday which was at issue. Ten years later the Session ordained that

"it salbe lesum to marie in all tim cuming upone Wednesday, swa that

1. Graham. 'Ecc.Disc.'; 164.
2. 'Macf.Geog.Coll'; II, 118.
3. 'K.S.Reg. St.Ands'(1); 341.

the three severall Sondagis befor the personis to be mareit thair bandis be proclaimit". 1 The final mention in the printed minutes is in 1597, a month after Archbishop George Gladstones took over as moderator. The Session had concluded

"upon gude causis and considerationis moving thame, that baptisme and marriage be ministrated in times cuming upon Weddinsday and Friday; to witt, marriage befor sermone, and baptisme efter sermone; onles necessitie require, and then the minister to use his discretioun thairin." 2 These quotations seem to imply that marriages were permitted on ordinary preaching days, but discouraged on Sundays because of the likely violation of the Sabbath by the secular festivities. Yet Carter in his study on 'Sunday Observance' shows that the Sabbatarian issue at St.Andrews was long-standing, with many shades of opinion and frequent changes in the attitude of the Session. He distinguishes 11 separate phases of opinion between 1572 and 1598. The Sabbatarian controversy is not reflected in all its complexity in the enactments of this particular Session on day of marriage, and it is only within that context that the enactments should be interpreted. The same is probably true of the enactments of the General Assembly.

The controversy over the day of marriage was not an issue debated only in the Assembly, but was debated at all levels within the Church. The regulations probably depended as much on the changing balances of opinion within the local sessions as on the answers of the General Assembly. For instance, a complaint was made against John Row, Minister of Perth, in the Assembly of 1573. It will be recalled that one aspect of this complaint was marriage on a Thursday, and that this was glossed over by

1. 'K.S.Reg. St.Ands' (1); 452. See also 'B.U.K.'; II, 439-441.

2. 'K.S.Reg. St.Ands' (1); 830.

the Assembly. Row had performed the marriage at the command of the session. Eleven years later Perth Kirk Session formally ordained that "marriages should be as well celebrated on Thursday within our parish kirk in time of sermon as on Sunday." 1 Yet within 15 months the same session had changed its mind and forbad "all marriages to be made on Sundays in the morning in time coming." 2

Despite the General Assembly's rulings of 1602 and 1610 that marriages were lawful on Sundays and ordinary preaching days, the records show that kirk sessions, presbyteries, and synods continued to forbid marriages on the Sabbath. In 1603 the elders of Tarves complained to Ellon Presbytery that "in <sup>h</sup>uteris parochins of uthir presbiteris mariages ar granted indifferently on the Sabboth yet thai were denyit to thame". The confusion complained of by the Synod of St. Andrews to the General Assembly in 1579 still remained twenty-four years later. The Presbytery of Jedburgh in 1614 also forbad marriages on the Sabbath. 3

The same arguments were used as in the sixteenth century. In 1614 the Kirk Session of Stirling,

"the brethrein understanding the importun and untimus suitis of the compleiting of mariagis suited be many personis in this congregatioun, at times nocht decent for that purpois, ... Inhibitis the granting of all sic suitis, and dischargeis the ministratioun of all mariages frathinefurth in this kirk except on the ordinar preaching day immediatlie after sermond, and at na uther time." 4 The session was apprehensive that marriages on a Sunday would lead to people breaking the Sabbath, which was held to be different from ordinary preaching days. This reasoning was

1. 'K.S.Reg.Perth'; 249.
2. 'K.S.Reg.Perth'; 253.
3. Foster. 'Ecc.Admin.'; 132.
4. 'K.S.Reg.Stirling' (2): 453; see also 479 (1642).

also used by the Synod of Aberdeen in an act of 1620, although the solution differed and was a compromise. The Synod ordered that marriages were not to be solemnised on either Saturdays or Sundays unless the parties gave a £40 bond that there would be no dancing or other profanation of the Sabbath. 1 Saturday was included probably because of the likelihood that the Sabbath would be profaned by people travelling home, or by the festivities continuing after midnight.

#### 4.2. Miscellaneous Regulations.

##### 4.2.1. Christian knowledge.

One of the causes and benefits of marriage was held to be the raising of children in God. Both the Canon Law and the Reformers stressed the role of the family in religious education, the husband being compared to a minister. This would be negated from the outset if the parents themselves were ignorant. It is not surprising then that a few pieces of evidence show that the Church did try to ensure that a married couple were not ignorant of their responsibilities. The practice may have been widespread despite the paucity of information from the records consulted, and the lack of relevant decisions in the surviving General Assembly records.

The first mention found is in the Kirk Session records of Perth. In 1578 the ministers and elders

"perceiving that those who compear before the Assembly to give up their banns to go forward to marriage are almost altogether ignorant, and misknow the causes why they should marry; therefore the Assembly ordain all such first to compear before the reader for the time, whoever he

1. Foster. 'Ecc.Admin.'; 229. See also 132-133 for some figures on Sunday marriage.

be, to the effect he may instruct them in the true knowledge of the causes of marriage before they come in before the Assembly" 1

The regulation passed the following year by the St. Andrews Kirk Session differed in emphasis. It was ordained that

"in time cuming, nane by resavit to compleit the band of matrimonie, withtout they rehers to the redar the Lordis Prayeris, Beleve, and the Commandmentis of God." 2 This statute is punitive, unlike the educational nature of the Perth order, and emphas<sup>as</sup>es basic Christian knowledge rather than those parts particularly relevant at the time of marriage. The punitive aspect was reiterated by the St. Andrews Session in 1595 when it was concluded that

"na persoun be contractit herefter in mariage, onles thai can say the Lord his Prayer, Belef, and Ten Commandimentis; and if any persoun present thame selfis quha can nocht say the samin, the persoun failyeing to pay xls to the box of the puir." 3 This act was repeated only 8 months later as one made of old, now of new approved and ratified. 4 The minutes show that the acts were enforced: people were fined (though not always 40 shillings) for their ignorance and ordered to acquire the knowledge before marriage. 5

Such statutes were approved at a level higher than the kirk session. At the synodal Visitation of Perth in 1611 it was statute and ordained that

"heirafter all contractis of persons to be joined in mariage be maid publictlie in the Sessioune; the parties being first tried upon thair knowledge of the Lords Prayer, Beleiff, and Ten Commandis. And

1. 'K.S.Reg.Perth'; 235.
2. 'K.S.Reg. St.Ands' (1); 439.
3. 'K.S.Reg. St.Ands' (1); 794.
4. 'K.S.Reg. St.Ands' (1); 809.
5. 'K.S.Reg. St.Ands' (1); 838-9, 840, 848, 908. (1597 to 1599).



having promised to continow in the professioun of the truth, as it is presentlie in this country, to thair lives end." 1 Presumably the Session's act of 1578 had been forgotton, ignored or disputed and the Synod needed to remind the Session of its responsibilities. The last sentence is probably a reflection of the tension being engendered by disputes over forms of Church government.

The practice of a religious test or instruction was common enough for Henderson to assume it was part of the Church of Scotland's normal practice in his 'Government and Order' of 1641. In the chapter on the 'order of marriage', he writes

"The parties are contracted before they be married, and before they be contracted, if there be any suspicion of their ignorance, they are examined in the grounds of Religion, and in their knowledge of the mutuall duties, which they owe each to other." 2

It was still intended to be a remedy for ignorance and a hope for the next generation. The General Assembly for 1648 received an overture for the remedies of the grievous and common sins of the land. One of the Domestic Remedies was

"Let persons to be married, and who have children to be baptized who are very rude and ignorant, be stirred up and exhorted, as at all times, so especially at that time, to attain some measure of Christian knowledge in the grounds of religion, that they may give to the minister, before the elder of the boundswerein they live, some accompt of their knowledge, that so they may the better teach their family and train up their children." 3 This clearly shows the reasoning behind the

1. 'Synod of Fife'; 16.
2. Henderson. 'Govt. and Order'; 26.
3. 'G.A.Acts'; 192.

examinations in Christian knowledge - the family could not be a centre of religious life unless the parents knew at least the basic beliefs as summarised in the Creed, Ten Commandments and the Lord's Prayer.

#### 4.2.2. Who solemnises marriage.

The minister or priest had traditionally been the person who solemnised marriages. It had been regarded as a duty peculiar to the Ministry because of its sacramental nature, and because of their responsibilities for preventing irregular marriages. The first 'Book of Discipline' and the 'Form of marriage' in the 'Book of Common Order' assumed that marriage is a function of the minister, and it is the minister who gives the blessing. There was, however, a period when marriage was permitted by another Church officer. Readers were authorised to administer the sacrament of baptism and to officiate at marriages in the 1570's. This was not a diminution in the status of marriage but rather an attempt to make the reader's office a regular order of the ministry. Donaldson believes it to be an attempt to assimilate readers to Anglican deacons to produce a three-fold ministry of superintendents, ministers and readers. 1

In the 1560's readers were not permitted to solemnise marriages, although a case in 1563 leaves some doubt. The superintendent of St. Andrews summoned Thomas Stirling, reader in Craill, for administering baptism and marriage, and ordered him to make public confession, "nocht being lawfully admittit to sic office". the minister of Craill did believe, however, that he had the authority to grant the reader power to solemnise marriages in his absence. 2 The view of the General Assembly was made clear three years later when it censured John Knox, reader in Bathgate, for baptising and solemnising marriages, "he

1. Donaldson. 'Scotland'; 142.
2. 'K.S.Reg. St.Ands (1); 176-178.

being but a simple reader". 1

The Assembly had changed its decision by 1571. In an act anent irregular marriages the Assembly inhibited ministers and exhorters from solemnising marriages between people outside of their parish without testimonials. 2 The change in policy was promulgated the following year:

"and that thair be redaires specialie appointed at every kirk, quhair convenientlie it may be, quhilkis being found qualifiet be the Bischop or Superintendent, and enterand be the lawchfull order of the true reformat Kirk, sall ministrat the sacrament of baptisme, and mak mariages efter proclamatioun of the bannes lawchfullie and orderlie as efferis". 3

The innovation was not without its problems - probably irregular marriages. At least one Synod took the matter into its own hands and suggested that the rest of the Church should follow suit. In 1579 the Synod of Lothian asked the General Assembly,

"In respect of great inconveniences that hes inseurit, and daylie does insew be Readers in using thair office, the hall brether hes inhibite all Readers from ministring the sacraments and solemnization of marriage, permitting nothing unto them but proclamation of the bands, and simple reiding of the text; desiring ane uniforme ordour to be establishit be the acts of the Generall Assemblie through all provinces."

The Assembly upheld their previous decision in their answer.

"So many Reidars as the Commissionars and Synodall Assemblies finds unmeit to solemnize marriage, to be inhibite to them". One would imagine that the Synods were already doing this as part of their normal

1. 'B.U.K.'; I, 82.

2. 'B.U.K.'; I, 192.

3. 'B.U.K.'; I, 211.

responsibility for discipline. The Assembly appears to have ducked the issue. 1

It is not clear when readers ceased to solemnise marriage. Possibly they continued to have the power delegated to them, until the office of readership gradually fell out of use. The 'Second Book of Discipline' in 1581, for instance, makes no mention of readers solemnising marriages and reserves marriage to ministers. 2 Certainly in 1597 readers were still allowed to celebrate marriages, although the basis of their authority was changed. The Assembly,

"because sundrie slanders rises, through the dissordour of reidears, be baptizeing of bairnes gottin in adulterie and fornicatioun, befor satisfactioun made by the offenders; and celebrating of unlawfull marriages: ... statutes and ordaines, that no Reidar minister the sacrament of baptisme in any way, in all times coming; and that they presume not to celebrate the bands of marriage without speciall command of the Minister of the Kirk; and in cace ther be no Minister therat, of the Presbytrie, had to that iffect: and ordaines every Presbytrie to cause this act to be intimat at every paroch kirk, that none pretend ignorance heirof in any time coming." 3 The celebration of marriage no longer pertained to the office of reader, and authority was in future to be delegated by the Minister or Presbytery to the reader. Previously readers were debarred for irregularities, now they were to be co-opted to solemnise marriages.

The last reference to readers solemnising marriage is in 1602 when the Presbytery of Paisley considered a marriage solemnised at Kilmarnock without proclamation of banns by a reader "having per[mission] of the kirk to celebrat mariadges". 4 There is no record of a subsequent statute forbidding readers to officiate at marriages, although apparently the

1. 'B.U.K.'; II, 438 -439.
2. 'Sec.Bk. of Disc.'; 494.
3. 'B.U.K.'; III, 927.
4. Foster. 'Ecc.Admin.'; 357.

situation was the same in the 1640's as it had been in 1560. Henderson says that the blessing was given by the minister, and the 'Directory' states that "we judge it expedient that Marriage be solemnised by a lawful Minister of the Word, that he may accordingly counsel them, and pray for a blessing upon them." 1

For thirty or forty years readers were allowed to perform two important duties of ministers - baptism and marriage - but were never allowed to preach, or enforce discipline. This probably was the result of practical imperatives and not imitation: Anglican deacons provided a suitable model and rationale to fit readers into the organisational framework of the Church. The Scottish Church did not have enough ministers for all its parishes either before or after the Reformation. The General Assembly still had to deal with pluralism, non-residence and vacancies despite its condemnation of the abuses of the medieval Church. There was the particular problem of how to cater to the needs of people in parishes without ministers, and to prevent irregular marriages or non-baptism. The Assembly changed the rules and used readers as a stop-gap measure. It was better to have marriages celebrated by readers rather than irregular marriages.

#### 4.2.3. Where.

The Church of Scotland throughout this period maintained that marriages should be celebrated 'in the face of the Church'. This meant more than just the building - the material on the day on which marriages should be solemnised by concerning itself with sermon days emphasises that 'in facie ecclesiae' was interpreted as meaning the congregation. The 'Form of Marriage' in the 'Book of Common Order' specifies that the parties

1. Henderson. 'Govt. and Order'; 26.  
'Directory'; 312.

assemble at the beginning of the sermon, and the service opened with -

"Dearlie beloved Bretherne, we are gathered together in the sight of God, and in the face of his Congregation, to knitt and joine these parties together in the honorable estate of Matrimony." 1 The first 'Book of Discipline' stresses the public nature of marriage:

"In a Reformed Church, marriage ought not to be secretly used, but in open face and public audience of the Church. ... in no wise can we admit marriage to be used secretly, how honourable that ever the persons be." 2

Such unambiguous statements, however, did not prevent private celebration. In 1571 the General Assembly statuted and ordained that

"all marriages be made solemmlie in the face of the congregatioun, according to the ordour publicklie establischt" because "trouble and slander hath risen for solemmizing of marriages in private houses, and that be ministers to whose paroch or kirk the contraveeners pertained not". 3 This was repeated ten years later when the Assembly concluded by the common consent of all brethren that in future

"no Marriage be celebrate, nor Sacraments ministrat in private houses, bot solemmlie according to the good ordour hitherto observit, under the pane of depositioun of the persons that uses the said ministratioun, from thair offices and functioun of the Ministrie in time comeing." 4

There are possibly two exceptions to this. Although Henderson says marriage "is most conveniently solemmized in the face of the Congregation", the 'Directory' says that Ministers are to publicly solemnise marriage "in the place appointed by authority for Public Worship". The emphasis is on the place, not the congregation, but this is contradicted by the

1. 'Bk. of Cn.Order'; 198.
2. 'Bk. of Disc'.; 318.
3. 'B.U.K.'; I, 192.
4. 'B.U.K.'; I, 525. See also 'B.U.K.'; I, 393.

Minister being directed to pronounce them husband and wife "in the face of the Congregation". 1 The second exception was when a licence for marriage had been issued by a bishop. The principle of marriage before the congregation, however, was maintained. An example of this is the order made by the Archbishop of St. Andrews and the Synod of Fife in 1683:

"being informed that several of the brethren, contrare to the laws and laudable customes of our Kirk, doe take upon them to gratifie the humors, and comply with the desires of some persones, both to baptise and marie privatlie, not in the kirk, but in privat houses, therefore they strictlie order, that none within this Diocesse shall presume to marie without warrant from our Ordinarie, or baptise without apparent necessitie, any person or persones of what degree of qualitie soever, in privat houses." 2

One of the main justifications for the public celebration was the enforcement of discipline and the requirement for a sufficient number of witnesses. Later disputes, for example over inheritance, could become intractable unless legitimacy could be proved by witnesses to the marriage. Private celebration could also be used to evade the requirements of banns, and the opportunity for people to object to the marriage. The General Assembly in 1587 for instance heard a complaint that William Kirkcaldy and Elizabeth Lyons had been married secretly without the proper proclamation of banns or a testimoniall from their Ministers because Elizabeth Lermouth had declared a lawful impediment on the second day of proclamation. 3 Public celebration of marriage was held to be essential so that anyone with an objection had the opportunity to make it known, and that there were sufficient witnesses. The 'Book of Common Order' required the Minister to say to the congregation:

1. Henderson. 'Govt. and Order'; 26.  
'Directory'; 313, 314.
2. 'Synod of Fife'; 196.
3. 'B.U.K.'; II, 695.

"I take you to wittenes that be here present, beseching you all to have good remembraunce hereof; and moreover, if there be any of you which knoweth that either of these parties be contracted to any other, or knoweth any other lawfull impediment, let theym nowe make declaration thereof." 1

But underlying public celebration was a more basic reason. Marriage was probably the most important change in status for most people. On the individual level, it brought the responsibility of wife and children to support and bring up to fend for themselves. With this offer went the wider responsibilities of a householder in the local community. There was also the kinship level: not only were your personal relations reorganised but also those of your kin and your wife's. Marriage created a new set of responsibilities, duties, obligations and expectations. Such changes were of importance to the whole community and most easily marked by the public celebration of marriage. This ensured that everyone knew what had happened.

#### 4.3. Banns.

The system of banns was introduced in 1215 by the fourth Lateran Council, and was promulgated in Scotland shortly afterwards. Their original purpose was to prevent the contracting of marriages where an impediment existed. Banns were to be proclaimed three times on successive Sundays (or sometimes festival days) in the parish or parishes in which the parties resided. The Reformers thus inherited a long-established practice, and their innovations lay in the extension of their use as a method of discipline.

1. 'Bk. of Cn. Order'; 200.



#### 4.3.1. The maintenance of the basic system.

The value that the Reformers placed on the system of banns is shown by it being one of the first measures adopted by the Reformed kirk in St.Andrews. In June 1560 the minister and elders ordained that

"all bannes of them, quhai ar contracted, or hes maid promise of mariage, be ressaved be the scribe of the consistoriall court of the minister and eldaris of the said citie, bait the parties being praesent before him (gif thai baith remane within the parochie of Sanctandros); and gif ane party remanes in ane uthir and salhappin come to this kirk to be married, that party sall bring ane testimoniall fra that part quhare thai remaine of the lawchfull proclamatioun of there bannes in there parochie kirk; like as, gif the ane party remanand heir sall take ane testimoniall heir of this kirk, being perchance married in ane uthir" . 1

This act made no innovations - the implied registration of banns had been anticipated by an act of the Provincial Council of 1552. The emphasis on testimonials probably derived from people avoiding discipline by marrying in 'foreign' parishes. The lack of novelty is also shown in the absence of any justification for banns in the 'Book of Common Order'. They are simply mentioned as part of the 'Form of Marriage':

"After the banes or contracte hathe bin publisshed thre severall dayes in the Congregation". 2

No formal decision on banns appears in the General Assembly's records until 1565, but the phrasing shows that the enactment of St.Andrews represented the practice of the Church of Scotland. The consensus was such that the statute of the Assembly was made unanimously.

1. 'K.S.Reg. St.Ands (1)'; 42.

2. 'Bk.of Gn.Order'; 198.

It was ordained that

"no minister heirafter receive the parochiners of ane other paroch to be married, without a sufficient testimoniall of the minister of the paroch wherfra they came, that the bands are lawfullie proclaimit, and na impediment found; sua that the ordour that hes bein tane be the Kirk in sick affaires be dewlie observit, under the paine of deprivation fra his ministrie, tinsell of his stipend, and uthers paines, as the Generall Kirk sall heirafter thinke to be injoynit". 1 The Assembly also concerned itself with a problem already faced by the Canon Law in the 13th century - people who maliciously presented impediments. In 1571 the Assembly was asked: "Quhat ordour sall be takin with them that impugnes proclamation of bands, and cheiflie be infamie, and proves not". The answer was that they should be punished as infamers according to the discipline of the Church. 2

The Church faced also the familiar problem<sup>of</sup> enforcing banns. The regulations had to be repeated in 1598 because

"diverse persons, with ane preposterous haste, has proceidit to the band of Matrimonie, without any lawfull proclamatioun of thair bands, quherthrow the ordinances of the Kirk are hielie contemnit". 3 The abuses did not lead to a modification of the system, and it remained the same in the sixteenth and seventeenth centuries as it had in the thirteenth, except in two ways. 4

The first concernēd the question of on which day banns should be proclaimed. It was usually assumed that the proclamations should be made

1. 'B.U.K.'; I, 72: see also 135.
2. 'B.U.K.'; I, 196.
3. 'B.U.K.'; III, 939.
4. Henderson. 'Govt. and Order'; 27.  
     'Directory'; 312-313.  
     Lamb. 'Ecc. Rules'; 165.  
     Laud. 'Works'; V, 594.

on three successive Sundays: certainly this was part of Canon Law. But the situation after 1560 differed because of the Sabbatarian controversy and because services were held on weekdays as well as Sundays. The 'Book of Common Order' does not specify Sundays - only in front of the congregation. Sunday is not mentioned specifically until twenty years later, but then only in passing in the context of marriages on Sundays. By the 17th century the rule was three successive Sundays. 1

The second change was the issuing of licences by bishops and archbishops to marry without banns. The Canons of 1636 reflect the discretion allowed to prelates during the first period of Episcopacy:

"Because some necessary causes occurs, wherein licence cannot be refused to marry without asking of banns; it is ordained, that no such licence be granted but to persons of good sort and quality, and upon good surety and caution taken that there be no impediments, and the persons not under the censure of the Church. Neither shall the licence be granted by any but the archbishop of the province or bishop of the diocese." 2

This was not abolished on the re-establishment of Presbyterianism despite the "many dangerous effects" it had produced. The power was transferred from the bishops to the Presbyteries. 3 At the Restoration the power to dispense with banns appears to have been given back to the archbishop and bishops. 4 There is no evidence in the sources used on whether the power to grant licences was abolished or given to the Presbyteries in the 1690's. Bishops certainly ceased to have the power when episcopacy was abolished, though this did not prevent the Bishop of Murray from

1. 'B.U.K.'; II, 440-441.  
'K.S.Reg.St.Ands (1)'; 452.  
Henderson. 'Govt.and Order'; 27.
2. Laud. 'Works'; V, 594.
3. 'G.A.Acts'; 26. (1638).
4. Lamb. 'Ecc.Rules'; 166.

issuing licences. In 1689 he was summoned before the Privy Council, and one of the complaints against him was that he continued "the exercises of that prelaticle power in granting licence for marieing of persones without proclamations of banns". 1

One case provides an illustration of the kind of circumstances in which the delay caused by the proclamation of banns was thought unwise. In 1662 the heir apparent of Lord Colven married Margaret Weyms, without proclamation, under a licence from the Archbishop of St. Andrews. Lamont wrote in his diary that

"This busines was done very suddenly, for the bride knew nothing of it till that morning: for the Lord Colven at this time was very sicke and death looked for; and it was accomplished by his advice to prevent the warde of the mariage". 2 Wardship would have meant the revenue of his estate going to the Crown until his son reached <sup>the age of majority</sup>, and a fine being paid on marriage. The right of choosing the bridegroom would have passed from the Colven family to the Crown. The bride's ignorance probably referred to the timing of the marriage rather than choice of bridegroom, and probably the marriage (and the property arrangements) had already been discussed between the two families. Wardship would have disrupted, or at least made more expensive, the plans of the two families.

The system of banns remained very much the same from the Reformation to 1711, and was similar to that of the medieval Scottish Church. An act of the General Assembly of 1699 is based on the experience of nearly 500 years. The statute was the outcome of an overture presented the previous year, and considered by the commissioners from Presbyteries, to remedy the several abuses that had crept in, in the way and manner of proclaiming banns. The General Assembly decided unanimously that:

1. 'R.P.C.'; XIV<sup>3</sup>, 406.
2. Lamont. 'Diary'; 153.

"before any proclamations be made, the names and designations of the persons to be married, and their parents, tutors, or curators, if they any have, be given up to the minister of the bounds in which any of them live and reside .... that the minister being satisfied herein, order the proclamation to be made three several Sabbaths, which, when made, shall be immediately before divine worship begin in the forenoon, and the persons to be proclaimed, their names and full designations, such as they are designed by in writs or contracts of marriage, be fully and audibly expressed, and that where there are more churches collegiate in the place or town, the proclamations be made in all and every one of the churches within the city or town where they or any of the persons to be married reside; and this to be attested to the minister that marries them". 1

The Act of Toleration made only one slight change in this procedure. Initially not even this was envisaged as it was necessary for the banns to be proclaimed in both the Episcopalian Church and in the churches to which the couple belonged as parishioners by virtue of their residence, (under pain of punishment for clandestine marriage). This was in line with the act of 1699. This was changed, however, by a separate schedule, annexed to the Act, which gave greater autonomy to Episcopalian ministers if the established Church did not co-operate. The ministers of the parish churches were

"obliged to publish the said Bans and in case of Neglect or Refusal it shall be sufficient to publish the said Bans in any Episcopal Congregation alone. 2

#### 4.3.2. The purpose of banns.

The purpose of banns under Canon Law had been to give an opportunity

1. 'G.A.Acts'; 276, 279.
2. 'Stats of the Realm'; 558-559.

to anyone who could state a lawful impediment to do so, and thus prevent an unlawful marriage. The Reformers used them for the same end: proclamation was made

"to the intent that if any person have intereste or title to either of the parties, they may have sufficient time to make their challenge". 1 A hundred-and-fifty years later the same sentiments were expressed by the Church of Scotland. In 1711 the General Assembly appointed that their acts

"concerning proclamation of banns be duly observed, and that enquiry be made, that the persons desiring marriage be not within the forbidden degrees, and be single and free persons, and that all concerned do consent." 2 In the 1640's and 1690's particular stress appears to have been placed on parental consent (see below). 3

Several cases of irregular marriages imply that banns were effective in finding out impediments. William Kirkcaldy and Elizabeth Lyon married without waiting for the third proclamation as Elizabeth Lermonth had declared a lawful impediment on the second day of proclamation. 4 Banns were not necessarily successful in preventing unlawful marriages as they could be circumvented by marrying clandestinely.

A secondary focus of banns was the use made of them to ensure that the marriage was duly solemnised. It was common in marriage contracts to give a date by which the contract should be performed - Midsummer day, Whitsunday, within three weeks - or to say it should be performed with "all gudly haist". 5

1. 'Bk. of Cn.Order'; 198.
2. 'G.A.Acts'; 450.
3. Henderson. 'Govt. and Order'; 26  
'G.A.Acts'; 279.
4. 'B.U.K.'; II, 695.
5. 'Prot.Bk.Caw'; 12, no 51; 20, no 87; 24, no 106.  
'Prot.Bk.Johnsoun'; 109, no 535.  
'Prot.Bk.Rollok'; 33, no 112.  
'Prot.Bk.Carruthers'; 52, no 157.

It was a widespread view that marriages should be solemnised within a 'reasonable time'. Banns provided the starting date for the period - or as the 'Directory' expressed it, "After the purpose or contract of Marriage hath been thus published, the Marriage is not to be long deferred." 1 The General Assembly did not lay down a specific period of time, although in practice it may have 40 days from the time of the contract. 2 The Session of St.Andrews sometimes required betrothed couples, guilty of fornication, to marry within 30 or 40 days. 3

Several kirk sessions also took pledges which were not returned if the couple failed to marry. The session of Stirling, for instance, ordained in 1621 that in future -

"nane be proclaimit quhill ilk partie that is parrochinaris of this kirk consing x lib in money, ather cunyeit or uncunyeit, for the better securitie, that nather of the parteis sall fealye in completing of thair marriage within the space of fourtie dayes nixt, and immediatlly following the first day of ther proclamatioun; quhilk if any of thame do, the partie fealyeand sall loise ther x lib consignit, and to be payit 'ad pious usus'". 4

A third use of banns was the taking of a pledge at the time of proclamation as a surety that the couple would not anticipate the privileges of marriage, and that the marriage celebrations would be held in a proper manner. The Kirk Session of Stenton in 1698, for instance, required a pledge of 2 dollars which was kept for nine months from the time of the proclamation of banns. It was forfeited if the

1. 'Directory'; 313.
2. Henderson. 'Govt. and Order'; 27.
3. 'K.S.Reg. St.Ands (1)'; 171, 232.
4. 'K.S.Reg.Stirling(2)'; 460.  
See also 'K.S.Reg.Cambusnethan'; 431.  
Graham. 'Ecc.Disc.'; 137.

couple did not marry, held a penny-wedding, or if premarital fornication was proven. 1 A similar statute had been made by the Session of Stirling 70 years before. Apart from non-performance (see above), the L10 was also for the better security

"that they sall abstein fra all hurdum togithir, that thay and thair cumpanies sall abstein fra all dansein on any part of the publict streitis of the toun; and that thair salbe na mair tane for ane man or ane womanis lawein on the day of thair mariage nor five shillingis". 2 These acts were made at the discretion of the local kirk sessions, and were not the result of enactments made by the General Assembly. As such they reflect the identification of particular problems and initiative by the Church at the local level. The exact conditions would therefore vary. In at least one parish they had become accepted custom. One of the many complaints laid against the Minister of Mayboll before the Privy Council to prove riot and oppression, was that

"when parties are to be married, they consigne penalties in their accustomed maner, and tho the same ought to be given back to the parties upon the purgeing 'in communi forma', yet the said Mr John Jaffray for the most part keepes up the same even albeit parties be willing to purge." 3

#### 4.3.3. Implications

The Church of Scotland inherited a system first introduced in the thirteenth century, and made use of it with few changes. While they enforced its original purpose - to uncover and prevent unlawful marriages - they added two new foci. The first was to ensure that

1. Graham. 'Ecc.Disc.'; 137.
2. 'K.S.Reg. Stirling (2)'; 460: see also, 479 (1642).
3. 'R.P.C.'; III<sup>3</sup>, 363-364. (1671).



the marriages were solemnised, and the second to take a surety for the good behaviour of the couple before their marriage, and the regulation of the secular festivities. This long tradition implies that the proclamation of banns met a need as its success depended on the participation of everyone in their own marriage or sometimes the stating of impediments to those of others.

The proclamation of banns was a public part of one of the most important changes in status for an individual - from child to wife/mother, and to husband/householder/father. The betrothal and legal contracts were essentially a matter for the two families - proclamation involved the approval of the marriage by the community, and neighbours. The '40' day rule emphasises that betrothal was a positive commitment to marry.

Banns reinforced the integral part played by the Church in the day-to-day life of society. They formed part of the disciplinary system of the Church of Scotland which was aimed at improving the morals of the people in line with Biblical teaching.

#### 4.4. Parental consent.

Parental consent to marriage is of great sociological interest as it shows the way in which authority is organised within the household and the family (kin); and in the case of the Church of Scotland, the overriding of familial authority through arbitration by an official of the state. There are likely to be differences between principles and practice, and between different social groups. The refusal of parental consent in particular cases may illustrate contemporary perceptions of mate selection, and the advantages of arranged marriages.

It is also necessary in this context to consider the impediment of force and fear, which could nullify a marriage. The impediment defines the boundary between the legal and illegal pressures that a parent and others might use to impose their own views as to the suitability of a marriage partner.

Parental consent was not usually a subject of controversy during the period covered by this research. The situation was characterised by an uneasy 'status quo' of leaving the law as it was, with a few attempts to strengthen the power and authority of the parent. At the Reformation and later, the General Assembly did consider making parental consent mandatory. This may be a reflection of the importance given to the Old Testament with its emphasis on the patriarch ruling his family. The failure of the General Assembly to achieve this probably shows the persistence of the medieval-traditional teachings of the pre-Reformation Church, both within the Church of Scotland and among civil lawyers. There was a clash between patriarchal ideas and those emphasising that free consent was an essential of marriage, and between principles and the self-interest of those with property.

Canon Law was clear: parental consent

"is not of the essence of the Sacrament (of marriage) but a matter of propriety, since it is not fitting to contract marriage when the parents are unwilling." 1 Restrictions were also placed on the pressure that a parent could lawfully apply by the impediment of force and fear. Fear out of respect for parents or guardians was insufficient, whereas force exercised by them could be grounds for nullity. Even subsequent intercourse would not necessarily ensure the validity of a marriage contracted as the lesser of two evils. The overriding consideration was that marriage was contracted by the free and mutual consent of the couple.

1. Hay. 'Lectures; 35.

This was maintained by the Council of Trent, although it was one of the few subjects which occasioned lengthy debate when the articles proposed by the Commission of Theologians was considered. The French prelates in particular desired that the marriages of children without the consent of their parents should be declared void, fixing however, an age when the consent of the parents would be no longer necessary. The Patriarch of Venice, one of the main opponents, argued that such a declaration would annul a sacrament, and violate the natural liberty which all possess upon coming to the age of puberty. Eventually the clause was omitted. The resulting decree reserved the right of the Church to declare such marriages invalid, but condemned those

"who falsely affirm that marriages contracted by the children of a family, without the consent of their parents, are invalid, and that parents can make such marriages either valid or invalid."

It was asserted, however, that such marriages - and clandestine marriages in general - had always been "detested and prohibited".<sup>1</sup> These debates are a useful reminder that the problem of parental consent was not confined to Scotland, nor to the Church of Scotland.

#### 4.4.1. The attitude of the Church of Scotland.

The Reformers attitude was similar to that expressed in the decree of the Council of Trent of 1563. They made marriages contracted without parental consent unlawful but maintained their validity because of the free and mutual consent of the parties. The decision was not enacted by the General Assembly but was included in the first 'Book of Discipline'. The subject was dealt with at some length, probably because of differences of opinion and it was of such significance that it was the first subject dealt with in the chapter 'Of Marriage'.

1. 'Trent Canons'; ccxxiii, ccxxvii, ccxxxii, 196.

The section is worth quoting in its entirety:

"public inhibition must be made that no persons under the power and obedience of others, such as sons and daughters, (and) those that be under curators, neither men nor women, contract marriage privily and without knowledge (of their parents, tutors, or curators, under whose power they are for the time): which if they do, the censure and discipline of the Church (ought) to proceed against them. If the son or daughter, or other, have their heart touched with desire of marriage, they are bound to give that honour to the parents that they open unto them their affection, asking of them counsel and assistance, how that motion, which they judge to be of God, may be performed. If the father, friend or master gainstand their request, and have no other cause than the common sort of men have (to wit, lack of goods, or because they are not so high-born as they require), yet must not the parties whose hearts are touched make any covenant till further declaration be made unto the Church of God. And, therefore, after they have opened their minds to their parents, or such others as have charge over them, they must declare it also to the Ministry, or to the Civil Magistrate, requiring them to travail with their parents for their consent, which to do they are bound. And if they, to wit, the Magistrate or Ministers, find not just cause why the marriage required may not be fulfilled, then, after sufficient admonition to the father, friend, master or superior, that none of them resist the work of God, the Ministry or Magistrate may enter in the place of the parent, and by consenting to their just requests may admit them to marriage. For the work of God ought not to be hindered by the corrupt affections of worldly men. The work of God we call, when two hearts (without filthiness before committed) are so joined that both require and are content to live together in

that holy bond of matrimony." 1

The first 'Book of Discipline' assumes that the initiative lies with the couple; the father does not inform his son that he will marry so-and-so. When the heart of the daughter or son was touched with the desire to marry, they were honour bound to inform their parents. The parent has the right to say who his offspring could not marry, but not who he must marry. Even if the parent refused for "no other cause than the common sort of men have ...", the couple must refrain from making any promise of marriage. The Church did not regard as valid the very objections which were most likely. The correct procedure on refusal was for the couple to declare their intentions to the Ministry or Civil Magistrate, who were obliged to try to persuade the parents to give their consent. If the Ministry or Magistrates failed, and found no just objections, they "may enter in the place of the parent" and give their consent. The justification for this usurpation of authority was that "the work of God ought not to be hindered by the corrupt affections of worldly men". This procedure was derived from Roman Law (see below 4.4.2), except for the inclusion of the alternative of the Ministry to the Magistrate as arbiter. This change may have been viewed as a temporary expedient. In the opening paragraphs of the 'Seventh Head, of Ecclesiastical Discipline' of the 'Book of Discipline' it is argued that the Church has to take upon itself some of the responsibilities of the civil sword because of the confusion Papistry has introduced. The Reformers did not believe that the State would apply God's laws as they should be and that this would engender contempt of virtue and bring in confusion and liberty to sin. A similar argument may have been applied to parental consent and account for the arbitration of the Ministry. 2

1. 'Bk. of Disc.'; 316-317.

2. 'Bk. of Disc.'; 306.

Certainly the procedure was not in practice temporary as in 1590 the Assembly adjudicated in a case where a father refused to consent to his daughter's marriage. 1

That the procedure set out in the 'Book of Discipline' was accepted by the Church is shown by the wording of the complaint against Robert Paterson and Janet Little in the General Assembly of 1565. They were accused of not following the lawful order after their parents had refused their consent, which was to "repairit to the Kirk of God to lament that cause, and seik the ordinarie meane thairat be the word of God appointit". No mention is made of the Magistrate. The case probably reflects doubt as to the authority of the Ministry to override the objections of a parent as the opportunity was taken to make an authoritative statement, and thus (hopefully) to remove any doubt. The commissioners of the General Assembly decerned that they should have proceeded

"first, to require the consent of the parents, whilk being refuisit, then to make ther suite unto the kirk, to concurre with them in ther lawfull proceidings according to the ordour observit in God's word". The commissioners also recommend<sup>ed</sup> that

"ane generall ordour to be sett foorth, as the General Assemblie sall think good, to be observed in all particular kirks in all time comeing." 2 The referral of the case to commissioners probably reveals that though the Church had accepted the procedure, its acceptance was not unanimous (especially as one of the commissioners was the rector of St. Andrews University, the traditional centre for the study of Canon Law in Scotland.)

1. B.U.K; II, 775-776.

See also: 'K.S.Reg. St.Ands (1)'; 366-367 (1572).

2. 'B.U.K.'; I, 61-62, 66, 72-73.

Parental consent to marriage was not raised again in the Assembly until 1581. In that year the Synod of Lothian submitted a petition which included the following clause:

"9. That ane article be suited be the Genarall Assemblie at the Parliament, that all marriages without consent of parents, proclamations of bands, or <sup>h</sup>uterways without the awin solemnities according to the ordour of the Kirk, be decernit null". 1 The suggestion that all irregular marriages should be made invalid was radical as existing law and Canon Law held that the solemnities were matters of mere propriety and were not essential for the validity of a marriage. What is even more surprising is that the Assembly ordained that this article "be cravit at the Parliament, beand first well qualified and presented to the Kirk". 2 There is, however, no record of the Assembly reconsidering the article nor of it being presented to Parliament. Such a remedy presupposes that there was a situation requiring such an alteration at least as perceived by the Synod of Lothian. These brief mentions are tantalisingly enigmatic - perhaps the Assembly was divided and the agreement of the Assembly was negated by its referral to a committee who rejected or could not agree on the original suggestion.

After 1590 the sources used include no mention of the intercession of the Church in disputes between parents and children over consent to marriage. The short-lived canons of 1636 and those proposed during the Restoration include the same regulations as used by the Church of England: it was not lawful to join people, who are under twenty-one, in marriage without the consent of their parents, or tutors and governors. The mention of an age when parental consent was no longer

1. 'B.U.K.'; II, 535.

2. 'B.U.K.'; II, 538.

required is novel in a Scottish context. In Scotland - owing partly to an indebtedness to Roman Law - consent was required until the child was economically independent of its parents, or under the power of others, as an apprentice for instance. 1 Henderson makes no mention of the Church's intercession either. His only comment is that the knowledge and consent of parents is required for marriage, and is made known at the time of the handing in of the banns to the session. 2

The clearest statement of the attitude of the Church of Scotland in the seventeenth century is in the 'Directory' of 1645. The pre-  
amble to the 'Form of Marriage' lays down the requirements as regards parental consent:

"Before that publication of such their purpose (if the parties be under age), the consent of the parents, or others under whose power they are (in case the parents be dead), is to be made known to the Church officers of that Congregation to be recorded.

"The like is to be observed in the proceedings of all others, although of age, whose parents are living, for their first Marriage. And, in after Marriages of either of those parties, they shall be exhorted not to contract Marriage without first acquainting their parents with it (if with conveniency it may be done), endeavouring to obtain their consent.

"Parents ought not to force their children to marry without their free consent, nor deny their own consent without just cause". 3  
This is a departure from the counsel of the first 'Book of Discipline'.

1. Laud. 'Works'; V, 594.  
Lamb. 'Ecc. Rules'; 165.
2. Henderson. 'Govt. and Order'; 26-27.
3. 'Directory'; 313.



The most striking part is the omission of any mention of arbitration in case of disputes between parents and children. However, this may be because a preamble to the marriage service was considered not to be the appropriate place for details of procedures. The 'Directory' is more specific than the 'Book of Discipline' in detailing the obligations. A more precise definition based on age and status partly replaces one based on relationships of authority within the household and family. A child of 21 and over was quite likely to remain in the household of his father and still be under his authority if he was the putative heir and perhaps this is why consent was still required for all first marriages. This is balanced by the exhortation to obtain parental consent for subsequent marriages as the son or daughter would be more likely to be under his own power, even if his parents co-resided with him. It is possible that this extension was included to cover the difficult situation where a married child cared for a sick or aged parent within his own household. The choice of a new marriage partner would affect the personal relationships within the household, and it might be particularly exacerbating if the house had originally been the parents'. The inclusion of remarriage, and of guardians, reflects the Church's appreciation that death of a spouse or both parents was not uncommon.

The 'Directory' is complemented by a discussion in the General Assembly of 1644 about parental consent to betrothal. This supports the view that parental consent was based on kinship rather than co-residence. The obligations between parents and children were more than the obligations between the head of the household and its members. An overture complained that it had been

"found by experience, that some young men being put to colledges by their wel-affected parents, that they may be instructed in the

knowledge of arts and sciences, to the intent that they may bee more able for publick employments in the ecclesiastick and civill state, that the said children has committed fornication; and the woman and her friends has seduced the foresaid schollers, being minors, to make promise of marriage to the party with whom they have committed fornication; and thereupon intends to get benefite of marriage with the said young men; not onely without the consent of their parents, but to their great grief, and to the great appearance of the ruine and overthrow of their estate; which may be the case of noblemen and gentlemen's children, as wel as of these of other estates and degrees within the kingdom." It was proposed that

"all such promises be made null and of none effect, especially where the maker of the promise is minor, and not willing to observe the samine, because his parents will not consent, but oppose and contradict, threatning to make him lose not onely his favour, but both blessing and birthright". This would be "very comfortable to many godly parents, who otherwise may be disappointed of their pious intentions, and have the comfort they expected turned to an heavy and grievous crosse". 1

The essence of the proposal was to make lack of parental consent grounds for declaring a betrothal null in cases involving minors (ie. under twenty-one). This was a novel suggestion in both Scots and Canon Law. Engagements, like marriages, depended on the free and mutual consent of the parties, and parental consent was not necessary for their validity. Similarly promises made through force and fear were invalid, and this proposal seems to legitimise the use of such pressure to renounce promises of marriage. It is not surprising that the General Assembly delayed the resolution of the matter until the

1. 'G.A.Acts'; 110-111.

next Assembly and remitted the overture to the Presbyteries for their judgement. The results of these deliberations are unfortunately not published, nor any decision by the Assembly.

The overture illustrates several social attitudes. The promise of marriage, for instance, is said to be exacted by the seduced woman and her friends, implying the existence of a moral code that condemned fornication by scholars and that marriage was the only honourable way to redeem one's guilt and the girl's reputation. Her friends were probably kin, and this emphasises that marriage was an arrangement between two families as well as two individuals - or in the present context, a dispute between two families.

More interesting, however, are the attitudes to the child-parent relationship. It is assumed that the parents are affronted by not being consulted, and this is reasoned on the lines of 'after all we have done for you'. Certain behaviour was clearly expected in return for an education and upbringing. The action of the minors in marrying against their parents' wishes turned the comfort the parents expected to an heavy and grievous cross. The parents feared that such willful behaviour meant that their children would not meet their obligations of looking after them in their old age.

There is also the assumption that the scholars were not marrying wisely, as they did not heed the advice of those who knew best: arranged marriages by implication secured the maintenance of their social standing and of the 'family' property. Such parental control over the choice of marriage partner was endorsed by the overture by the reference made to the pious intentions of godly parents. The intention of the seduced woman, in contrast, was to obtain property through marriage at the expense of the child's family. This conflict of interests, between the maintenance and acquisition of property,

would be present even in arranged marriages as is illustrated by several examples below (see 4.4.3.3).

The presentation in the overture of the problem is very one-sided : all the blame is apportioned to the woman. It is the <sup>women</sup> who seduce the scholars to promise marriage and it is not imagined that the scholars, on reflection, would wish to marry them. It is conceivable that some of the scholars wanted to marry their partner in fornication. They were partly removed from the oversight of their parents as many no doubt lived in lodgings or with a relative. The threat of disinheritance may have been less than if they were living at home and expecting part of the family property. Their education probably formed the major part of their birthright as they could earn their living in the Church or at law rather than from the revenue from inherited property.

This bias in the overture needs explanation. The overture proposes changes in the law which would affect all social classes because of the risk of such marriages to noblemen's and gentlemen's families. There is no thought given to those with little or no property. The overture is concerned with the problems of those ranks of society from which most ministers probably came in the 1640's and to which they belonged. The ministers were of noble and gentle families, and many had no doubt been scholars and had some children at college. The motives behind the overture appear to have been as much self-interest as to remedy a conflict which was causing discomfort to some parents.

#### 4.4.2. Civil Law.

Scots law in the sixteenth and seventeenth centuries owed a considerable debt to Roman Law, either directly or via the Canon Law. The 'Institutes of Justinian' in considering parental consent made a distinction between those under the power of parents and those who were not. Persons were either 'sui iuris' or 'alieni iuris', which

was subdivided into those who were under the power of parents and those who were under the power of masters (ie. they were slaves). The 'Institutes' required children subject to 'patria potestas' to have parental consent for

"Civil law and natural reason agree in requiring this consent, and that the parent's authority should be given before marriage". The consent of the father was not required if he was insane: the 'dos' and 'donatio propter nuptias' in such cases were to be settled by the appropriate authority. More interesting, is that a son or daughter could apply to a magistrate for leave to marry if consent was unreasonably withheld. 1 All children born in lawful wedlock were in the power of their parents, and only became 'sui iuris' on the death of the father, or by manumission in the case of a son. A daughter on marriage came under her husband's power. 2 These ideas were taken up by the Church - the use of the magistrate in the first 'Book of Discipline' - and by Scots Law.

The major source is the commentaries by Scots Lawyers, as parental consent is not included in specific Acts of Parliament. The Acts anent clandestine marriage imply that the law was settled. This is a false impression if Craig is to be believed:

"Even today there is controversy among the most erudite lawyers as to the validity of a marriage entered into by a son living in family with his father without the latter's consent". 3 This controversy must have continued or reappeared as in 1698 an Act was drafted against children marrying without their parents' consent; this was read on August 24 but was ordered "to lie on the table". 4

1. Lee. 'Roman Law'; 65, 80.
2. Lee. 'Roman Law'; 80, 84, 85.
3. Craig. 'Jus Feudale'; 832 (1603).
4. 'A.P.S.'; X, 146.

The Act was unlikely to have dealt with irregular marriages as an Act against such marriages had been read for the first time on the 19 August and touched with the sceptre on the 30th. 1

The controversy was probably about the applicability of a part of Roman Law in seventeenth century Scotland. Craig uses the phrase 'living in family' which is a transliteration of 'patria potestas' to fit the context of Scottish society. His position, derived from Roman, Canon and Feudal Law, was the same as that of the first Book of Discipline:

"while no one should be constrained to wedlock, and while freedom of choice in marriage should not be interfered with (least of all by considerations of property), yet both by the Law of God and by human law a son must have regard to his father's advice and approval in selecting a wife, so long as he continues under his father's 'potestas'". 2

The emphasis is placed on the relationship within the household between the father and son, (and typically no mention is made of daughters). As long as the father was the head of the household, his son required his consent to marry. Yet by the 1640's opinion in the Church had altered and consent was only required - rather than exhorted - for those under the age of majority and for first marriages. Perhaps the controversy referred to by Craig was part of the working towards this change from the law being based on familial relationships to one qualified by age.

This interpretation seems to be reinforced by Sir George MacKenzie's comments in his 'Observations' published in 1686. He accepts that the parental power of refusal was not absolute, and that the parent may be culpable in refusing his consent if he refused reasonable offers. 3

1. 'A.P.S.'; X, 144, 148.
2. Craig. 'Jus Feudale'; 832.
3. MacKenzie. 'Observations'; 398.

More particularly his first observation on the 'Act against Irregular Marriages' of 1661 is that:

"The want of the Parents consent, or of the consent of others having interest, seems by the Narrative, to infer the Clandestineness of the Marriage: But yet by our practise, Children marrying without the consent of their Parents, if they be of age, and the Marriage otherwise regular, they are not punishable, wherein we seem to agree rather with the Counsel of Trent, than either with the Law of God ... Or the Civil Law". 1 MacKenzie is in fact contrasting the letter of the law with its practice, and omits the qualification of all first marriages. The Act's preamble refers to all those who "decline the concurrence and consent of their parents, or others haveing interest" without any qualification about age, or even of residence. 2 The Act was in line with the first 'Book of Discipline' and with Roman Law. Legal practice, however, was similar to the statements made in the 'Directory' where a distinction is made between majors and minors. The controversy can be interpreted within the framework of Roman Law as a change in the basis of separating people into those who were 'sui iuris' and those who were 'alieni iuris' - the age of majority had the same effect as manumission.

Roman Law and Canon Law were used as a source by Scots Law in framing its attitude to the necessity of parental consent to marriage. There was controversy in the seventeenth century over the extent of parental control, and this was resolved by distinguishing between the statutes - the Acts against Irregular Marriage - and practice. The Church of Scotland formalised the change by including the distinction

1. MacKenzie. 'Observations'; 397.

2. 'A.P.S.'; VII, 231.

between majors and minors in the 'Directory'. Stair might have had this in mind when he made the generalisation that -

"It will not much be debated, but the Direction of Children in their Minority is naturally stated in their Parents; but the greatest Question will remain, of their full age, when the Children become able to govern themselves, and their own Affairs". 1

It is not possible to say why this change occurred<sup>from residential to age distinctions</sup>. It may have been due to social changes or be an adaptation of the law to what had been happening in practice for some time. Alternatively the change may have been on the level of ideas without particular reference to social changes - a comparison, for instance, of Scots Law with English and Dutch law. The law relating to parental consent, however, does illustrate Craig's comments that Roman Law is used

"so far as it appears to us to be consonant with natural equity and reason" and "it may be said that the Civil Law is so diffused about all the departments of the Law of Scotland that almost no question and no sort of case can occur in which its influence does not find signal illustration". 2

#### 4.4.3. Legal remedies for a marriage without parental consent.

There were several legal actions a parent could raise if a child married without his consent. The only way a marriage could be annulled, however, was to prove that the consent was defective in some way. One of the more likely grounds was the impediment of force and fear - it could be alleged that the putative husband or the friends of either side had forced one of the parties to take the marriage vow. This cut both ways and was also applicable when parents forced their child to marry according to their wishes.

1. Stair. 'Institutes'; 37.
2. Craig. 'Jus Feudale'; 28, 29.



The Acts anent rapt also involved force and fear, but a conviction under criminal law did not directly affect the validity of the marriage which could only be annulled by the Commissary Courts. Rapt should not be regarded as synonymous with rape as the term included forcible abduction and did not have a specific sexual connotation.

The last possible action which will be discussed was the raising of a suit for rapt and/or clandestine marriage before the Privy Council. These cases are particularly interesting as they provide examples of the arguments for and against particular marriages.

#### 4.4.3.1. The impediment of force and fear.

The impediment of force and fear changed little from before the Reformation. The records of the Church of Scotland consulted include no enactments referring to it, nor are there any Acts of Parliament. The application of the law rested for most of the period with the Commissary Courts, whose records are unpublished. This lack of material is interpreted as implying there were no changes to the traditional Canon Law. Certainly the view was upheld that free consent was an essential of marriage, and from this arose the opposition to making invalid irregular marriages. Fear out of respect for your parents was insufficient - fear of violence seems to have been necessary.

The same principles applied to betrothal, and the legal grounds for a suit of nullity were similar to those for marriage. It is not, therefore, inappropriate to illustrate the application of this impediment by citing two disputed betrothals, both involving pressure exerted on a child to marry according to the wishes of others.

The Kirk Session of St. Andrews heard a case in 1565 between James Beynston and Joanna Hepburn, illegitimate daughter of Patrick Bishop of Murray, to examine why they should not proceed to the

solemnisation of their marriage. A contract of marriage had been made between them with the consent of their parents and published by proclamation of banns. Joanna Hepburn argued that the betrothal should be held invalid as she was compelled to consent by a just fear and dread of her brother, the parson of Knoyr. He had threatened to drown her in the water of Erne and (presumably as an alternative) that "sche suld never get gud of hyr father bot ganglik ane huir". She was far from her friends and only 13 or 14 years of age. Joanna was finally compelled to consent

"with sorowfull mind and sair hart, bursting out with tearis <sup>h</sup> throw the awfull and terrebill fear and threatning of my said brother" . Her prospective husband had also been threatened: his father ordered him to consent "or ellis he suld never get gud of him nor nan of his heretaige". The Kirk Session found that the marriage promise was null and the couple were free to marry any lawfull party because there

"is nor wes ~~no~~ fre nor lawfull promis nor willing consent bot maid throw fear of threatningis, with wepying and lamentabill contenance". 1 Both parties were threatened by disinheritance, but this is unlikely to have been of importance in proving nullity. More important was the threat of death and the weeping which was a visible sign of Joanna's fear and unwillingness at the time of the betrothal. Joanna's case also emphasises the absence of support in opposing her brother she might have expected from her absent friends. These friends were probably other kin and neighbours. The records unfortunately do not give any clues as to why her brother rather than her father was making the threats.

1. 'KS. Reg. St. Ands(1)'; 234-236, 238.

A second case of 1575, also heard before the Kirk Session of St. Andrews, illustrates what was considered lawful pressure as Elizabeth Mcky failed to prove that she had been compelled to handfast with Thomas Read. Most of the witnesses deponed that there had been no compulsion at the handfasting. One, however, had heard Elizabeth's father say to her:

"Gif thou wil not be content to do my counsal thou sal have na geir of mine: and sche answered, I desire to mary na man". Another witness was found after an adjournment of eight days who testified that her father said to her,

"I have spokin witht Thome Read, quhat thinkis though of it?" Elizabeth answered "Fathir, quhat alis you at me? Ye ar thyrit of me! Gif ye will gif me ony thing, gif me it, and ye sal hald it to your self quhil ye lieff". Her father responded, "Quein! quhat auchtis to the? Gai seik thy motheris testament, truly ony thing though aucht to have of it thou sal have!" 1 The only threat made was of disinheritance, though this was tempered by the second witness reporting that the father had offered her a share of her mother's estate. This did not qualify as force and Elizabeth's replies as reported show no sign of fear. The case is also an example where the parent took the initiative in 'arranging' a marriage, and though he asked for Elizabeth's opinion, it is doubtful if he expected her to refuse in such a petulant manner. Her dismissal of any thought of marriage appears to have been taken by him as a sign of ingratitude. It may be some measure of her strength of will, or ineffectiveness on the part of the Session, that, though they upheld the validity of the betrothal, they were still trying to get her to solemnise marriage with Thomas Read in 1579. The records do not show if the Session was eventually successful.

1. 'K.S.Reg. St.Ands(1)'; 405, 410, 434.

#### 4.4.3.2. Rapt.

It was only by an action through the Church/Commissary Courts that a marriage could be annulled. There was, however, criminal legislation which could be used for redress and a successful prosecution would probably help to secure annulment on the grounds of force and fear. The crime of ravishment had a broader meaning than rape, and included abduction and seduction.

This is illustrated by the events which culminated in the passing of an Act against Ravishers of Women in 1612. Parliament established a commission in 1609 to consider a letter from James VI, and to report their findings to the next Parliament. They were to consider the several degrees and branches of the crime of ravishing women, and appropriate punishments. In his letter to Parliament, James complained that ravishment of women had become too frequent because of either slackness in the execution of existing laws or the obscurity of the laws. He asked Parliament to pass an Act which recognised three branches of the crime.

The first was rape - "those that do ravische ony woman ather wedow married or maid and have copulatioun with hir aganis hir will". The King asked Parliament to consider what punishments should be inflicted in addition to those already appointed, and to declare that the subsequent consent of the woman did not absolve the accused.

The second was abduction, especially in cases where the woman was rescued by her friends - that is kin - or the magistrate. James suggested that cases of ravishment "whairin na forder actioun then onlie away taking dois follow" should be considered as a capital crime because the offender "did his endeavour To committ the worst". The suggestion is that the intention in abduction was rape, and should therefore be treated as such. But the suggested punishment reveals that this was being used as a plausible reason for the harsher

punishment of abductors and that it would have included elopements. It could be applied to cases where a couple married without parental consent as this was usually interpreted as the desire for lands on the part of the man, and unwillingness on the part of the woman. James believed that offenders would be discouraged if some provision was "made by the statute to disappoint the hope of these their unlawful hopes" because it is "not the respect of the person but the aim either to the goods or lands of the parties ravished in possession or appearance that moves the fact".

The last branch of ravishment was seduction -

"A new form used to avoid punishment in the law of preying without knowledge of the parent tutor testamentary or guardian of the maid being young of years and their with of frail sex to entice him to go with them".

This was clearly intended to discourage elopement as not only was the seducer to be punished (by means unspecified), but the seduced party was also to be secluded and disinherited. The King suggested that if a maid under sixteen years old went away without the knowledge or consent of her father either the whole or part of what would usually come to her, should be given to her next of kin. This did not apply to those over sixteen who were presumed to have reached the age of discretion and could make a right choice: they would "hardly without consent of friends (kin) cast themselves away". 1

The interpretation that the King intended that people who married without consent of their parents should be punished by an Act against ravishment is supported by the records of the Privy Council. Included in its Register are notes of matters for consideration by the approaching Parliament (October 1612) or by the Council. This same Parliament passed an Act against ravishers of women, but none

1. 'A.P.S.'; IV, 454.

specifically against marriage without parental consent. One of the matters was, however,

"Anent the inconvenient of the mairiage of minoris without consent of thair parentis, and puneisment of sik as seduces menes sones and dochters and intises thame to mairiage without knowledge and consent of thair parentis". 1 The phrasing shows that this matter was the third branch of ravishment - seduction - mentioned by James in his letter.

The Act against ravishers of women in fact did not deal with this, but with a point suggested by James in the first branch of rape which was applied to the second branch of abduction. The Act declared that an offender was not exempt from guilt by arguing that the woman went of her own free will and consent:

"if the womans parents or nerast kinisfolkis or his Majesties advocat be able to verifie be determinatioun of the assisse that the fact was at first violentlie and forceable done againis the parties will and without there consent."

The offender could be punished by warding, confiscation of goods, or fining at the King's pleasure, but was exempt from capital punishment. 2

The development of this Act raises several interesting questions. It illustrates that Parliament could act independently of the King and the Privy Council and that the Parliamentary Commission was not a rubber stamp. The sparse records, however, do not reveal why the King raised the question in the first place. The Act shows that legislation could be stretched to include matters which, at least to modern eyes, did not come within its ambit, though not why this was preferable to an Act against seducers or abductors. Parliament may have felt that a line could be drawn between abduction, which

1. 'R.P.C.'; XIV<sup>1</sup>, 568.
2. 'A.P.S.'; IV, 471.

included an element of force similar to rape, and seduction where the parties' consent is implied, although thought to be based on poor judgement or immaturity. The development does illustrate that parental consent was thought necessary for marriage, that a parent's judgement was thought better than that of his children, and that the choice of a marriage partner was too important to be left to the individual.

#### 4.4.3.3. Action before the Privy Council.

Another course of action available to a parent whose child had married without their consent was the raising of an action for rapt or clandestine marriage before the Privy Council. An advantage was that a decree of the Council did not preclude a subsequent civil action for instance, a suit to declare a marriage null. It did, however, mean that any criminal pursuit for ravishment had to be abandoned. More importantly the impression gained from the frequent cases is that the Council's role was not primarily of finding guilt but of acting as an arbiter. In many cases the phrasing of the action as a suit of rapt conceals that the conflict was within the kinship group. Parental consent to a marriage appears to have focused conflicting ambitions and interests within the family. An action before the Privy council had several advantages if the Council was arbitrating between these interests. The most important of these was the finality of the Council's decision. For example, a defender, condemned or absolved by the Council, could never be tried again by the same pursuer for the same offence. It was also incompetent to raise a further action if in the action before the Council, the pursuer consented to abandon his civil pursuits, or if satisfaction was ordained by the Council or agreed with the defender. 1

1. McNeill. 'Jurisdiction'; 139, 140.

The Council had wide powers to fine and ward offenders, and to direct a settlement of property. Its decision could take the place of the marriage settlement/<sup>which</sup> was normally made before marriage. The Council could also take preventative measures by making a person its ward if her relatives believed she might be abducted. In 1668 an act was published by special order that

"all who assist in taking away any young gentlewoman within age contrary to the Council's commands are punishable in such manner as the Council shall think fitting, and such as contract marriage with them are punishable with fines equivalent to their tocher". <sup>1</sup> This was similar to the suggestion made by James VI in 1609 that abductors should be disappointed of their unlawful hopes for the goods and lands of the ravished party.

The suits before the Privy Council are particularly interesting as they reveal the motives of the people. Despite the formal phrasing the wording reveals the network of values and relationships which were focused by a marriage without parental consent. The case of Jean Home, for instance, shows the bitter feelings that could be engendered within the same family by the disposition of property, and which were brought to a head by the marriage of an heir. In brief, the background is that one part of the Home family felt they had been passed over when the estate of Aytoun had been deponed upon Jean Home. The other part of the family abducted Jean Home and married her clandestinely to one of their own side. The complainer, John Home of Planderghaist, was one of those who felt cheated as the Laird of Aytoun had passed over his own relations and the true line of the family. His objection to the marriage was that

"ther was nothing left to the said compleaner and the rest of the familie bot the hopes of the seing the said Jean Home weall bestowed

1. 'R.P.C.'; V<sup>3</sup>, 127.



upon one of their owne familiee, or at least upon some persone who might have viewed the obligation to the fathers friends, and might upon that account bein carefull of that estate and kindlie dutifull to its relationes."

The Privy Council fined all those involved in the irregular marriage and Jean Home and her husband were deprived of their marital rights and sentenced to three months imprisonment. Although the complainer asked for compensation and was in fact awarded 2000 marks out of the fines, more than money or property was involved. The complainer was interested in the social obligations which arose out of marriage - his least hope had been that the husband would have been someone who would have been "kindlie dutifull to its relationes". 1

The second case also involves a conflict between different sides of the same family, but its chief interest is the counter-arguments used by the defenders. David Scott was pursuing his daughter, Jean Scott, and her husband, Francis Ogilvie, because of

"my daughters unnaturall cariage to me in being so easely sedoussed and intised by an straingir who had no othir desine in that affaيرة but to **rouen** may small essteat to uphoald his formir extravagant coursis".

The phrasing shows the usual interpretation of the actions of the child by an offended parent, or at least the way the events were structured in a legal suit. The husband is portrayed as someone unknown to the parent, who was an undesirable match because he was a spendthrift, and whose motives were the accumulation of property without regard to the interests of the daughter. The daughter is seen as putting aside her natural obligations to her father: she really knew better and her ingratitude surprised her father.

1. 'R.P.C.'; V<sup>3</sup>, 398-400 (1678).

This interpretation is denied by the defenders. They argued that David Scott was not a grieving and deceived father, but had only raised the action under pressure from some of his relatives who hoped to gain his estate by endeavouring to keep up the difference between David Scott and his daughter. It was the relatives who were motivated by the desire for property, and not Francis Ogilvie. Their interpretation of the events is very different:

"The said Francis Ogilvie and Jean Scott having for severall years bygoin contracted ane mutuall and intire love and affection and resolved to live and die together, the said Francis did patiently attend expecting her fathers consent and approbatione to the intended marriage, but the said Jean Scott, finding that her fathers relations wer endeavouring to force her upon another man for whom she had no kindes" wrote a letter to Francis and arranged her own elopement. <sup>1</sup> Francis was, therefore, no stranger and the couple had known each other for several years. They had not wanted to deceive her father but had been forced to do so by scheming relatives. The initiative had come from Jean Scott, and she had married of her own free will. The emphasis on their emotional attachment is particularly significant as it shows that the defenders thought that 'love' was a credible defence for not seeking parental consent. The records unfortunately do not state the Privy Council's judgement.

The last case again involves an inter-kin dispute. The main protagonists are the uncle and mother of Janet Rocheid, who disagreed on which marriage was in Janet's best interests. The participants included the grandmother, tutors, and friends (kin) of both sides.

1. 'R.P.C.'; IX<sup>3</sup>, 306-309, 311 (1684).

The case shows that the marriage of an heiress was of importance to the whole 'family'. The father of Janet Rocheid had wished to "continow his estate derived to him from his father in the presence of such as were lawfullie descendit of his father", especially the land in the possession of his brother, James. He had accordingly ordained in his will that Janet, his only daughter, should marry his brother's son. His widow had different ideas, however, and in defiance of an order of the Privy Council had conveyed her daughter across the English border and had married her to William Morisone. The brother, James, argued that the mother had thus

"most sacrolegiously dissappointed the will of the defunct and the just expectatione which the said Mr. James, his sone, had of his grand-fathers estate."

The mother countered by stating that whatever she had done "in that affaire was singlie out of ane extraordinarie concerne and tenderness for the happiness of her only child." The marriage was "in itselife most convenient and equall, and againest which ther could be no rationall exceptione". The kin of both families had considered it, and it had been recommended by Janet's grandmother. Another of the tutors had also strongly pressed the mother to conclude the marriage. The marriage had not been a sudden resolution to disappoint the sequestration of the Privy Council. Janet had not objected to the marriage: she had

"no want of inclinatione as, the match being otherwayes so desirable and equall, hir mother and hir neirest interests, who had no other designe but hir good and happiness was satisfied therewith". It is not said that Janet had any affection or love for her husband. The mother further denied having any sinister designs against James Rocheid: she had not ignored his interest and had on the eve of his

previous application to the Privy Council, informed him of a new proposal made to her of a very considerable match for her daughter. James, however, had proposed his own son as future husband, which she had argued against,

"both from hir daughters aversione particularly knowin to himselfe, and from the unequalitie of ther years, hir daughter being within two monethes of 12 years of age, Mr James his son not being than 9, and of a statur scarce suteable to that age, besides the great unequalitie as to other advantages of fourtoun and birth in matches".

He had tried to secure the mother's agreement by offering her the life-rent of the whole of her daughter's estate. This was to no avail as the mother rejected such an unworthy proposal with the disdain it deserved, "preferring hir daughters happines much befor hir privat interest and advantag".

The mother also denied that James had an interest in his niece's marriage because his previous behaviour had negated any kinship obligations. He had not been so much as on speaking terms with her husband for several years, and the

"differences and animosities ware so high betwixt them as Mr James did not render him the common offices of humanitie as by comeing to the buriall of his brothirs children and visiting them the time of ther sickness".

The Privy Council, however, were not swayed by the mother's defences and punished the parties by fining them heavily for the clandestine marriage, and imprisoning them until the money was paid. The marriage remained valid, and James Rocheid was awarded 9,000 merks out of the fines "for reparation to him of the damages and interest sustained by him." 1

1. 'R.P.C.'; V<sup>3</sup>, 127-129, 620-621 (1677).

In this case the uncle argues that the marriage conflicts with the settlement made of the father's land. He had expected his son to reunite the land through marriage and thus preserve the original estate. The mother denies that this obligation existed any longer as the uncle had failed to observe the obligations expected of him. She argues that what mattered above all else was the happiness of her daughter which was defined by her as a good match-equality of land and status, and personal compatibility. Love is not considered in the arguments.

On a more general level, the case illustrates two points. The first is that parental consent in practice meant the consent of the father - the mother's opinions relied for their influence on the nature of her relationship with her husband. If curators or tutors were appointed for the children on their father's death, the mother's influence on the choice of marriage partner pertained to her position as a guardian and not as a parent. Thus as far as consent of marriage was concerned, fatherless children were equated with parentless children and their marriage was decided by a number of kin rather than by the father alone with the advice of kin.

The second is that the uncle's arguments show that there were advantages for an endogamous marriage in contrast to the advantages usually stressed for exogamy. A cross-cousin marriage ensured that the land remained within the family. It is apparent here that the estates of the two cousins were unequal so that the uncle's son stood to gain more by endogamy than exogamy, and that Janet Rocheid was likely to get a better match by marrying someone other than her cousin. The advantages in expanding the kinship network were not all one-sided as in non-clan descent systems the intrageneration ties would be weakened the more remote each generation was from the common ancestor.

A cross-cousin marriage in theory would strengthen existing ties of kinship as against the creation of new kinship links in an exogamous marriage. The choice of either alternative would presumably depend on the specific opportunities open to a family. Disputes could arise, as in the case of Janet Rocheid, where the two sides of the family had different perceptions as to what was most advantageous, and where there was an inequality in what could be offered in a match.

#### 4.4.4. Summary.

Parental consent was considered necessary to marriage throughout the period studied, but it was never made a prerequisite for a valid marriage. Some changes did occur between the publication of the first 'Book of Discipline' and the 'Directory' in 1645. Initially parental consent was thought necessary for all marriages, but this was altered to all first marriages and for persons under 21. Children were required to only acquaint their parents of their intention to remarry. The introduction of a dividing line based on age rather than household relationships was novel. It is not known why this change was made and whether or not it reflected or made changes in behaviour. This shift was also included in Civil Law - for instance, Stair saw the question of parental consent to the marriage of minors under their own power as still being unsettled.

Parental consent was basically the consent of the father (or step-father) or those who stood in his place. These could be legal guardians (tutors, curators) or a member of kin. For instance, Lady Isabel Hay while on the Continent asked Gilbert Blakhal's advice concerning

"the resolution that her brother (Earl of Errol) had taken to marrye her at home, and that, if she would not returne home, he would not send her money to subsist abroad; whereupon I counsell'd her to obey

his ordre, since her father being deceased, and her portion that he had stated upon her in her brother's hand, he was to her in place both of father and brother, and her mother being departed this liff ninne or tenne yeares before her father, so that she had non to relay upon but him". 1 The Earl of Errol owes his influence in this illustration to being her nearest surviving kin, and guardian of her estate (though not her person). Who exercised parental consent - if anyone - if the father was dead is not a minor problem. The late age of marriage in Western Europe meant that there was a good chance that the father would be dead before all his children were married. For first marriages in Manchester in the 1650's, for example, 58% of brides and 49% of bridegrooms had lost their fathers. 2 It is possible that the father's heir assumed the role of 'in loco parentis' both as elder brother and in other cases as uncle or guardian for his nephew. The mother's position is ill-defined in the sources used and it is possible that she gave consent only when no guardians were appointed, or when she retained control over the property instead of a life-interest. 3

There is also one other person whose position is not clear. The first 'Book of Discipline' included masters as one of the people who could stand in for the father. This is derived from the Roman Law division of persons into 'sui iuris' and 'alieni iuris'. It is not mentioned again, unless it is comprehended under the phrase "or others under whose power they be". The role of masters is worthy of further research as it would illustrate the extent to which the law equated the relationship between head of the household and a living-in servant

1. Blakhall, 'Briefe Narration'; 18. (c 1631-1637.)
2. Laslett. 'World We Have Lost'; 289.
3. See Sibbald 'Memoirs'; 67-69.

as that between parent and child.

Parental consent also comprehended the interests of a much wider circle of kin and neighbours. Although the final decision was the responsibility of the father, he was expected to heed the advice of kin and look after their interests as well. The suits before the Privy Council illustrates the feelings that could be engendered if some kin felt that their interests were being neglected, especially where the consent rested with several guardians instead of one person and concerned the marriage of the heir.

An action before the Commissary Courts on the grounds of force and fear was the only way parents could sue for the nullity of a marriage contracted without their consent. It could also be used to nullify a marriage forced on a child by a parent. The criminal law could be invoked against the spouse as an abductor or seducer under the new laws anent rapt. The Privy Council also heard actions involving rapt and/or clandestine marriage, and appears to have acted as an arbiter in some cases. The details of particular suits show the kind of factors that were considered in deciding upon a match, especially equality of fortune and status, and inclination of the prospective couple.

#### 4.4.5. Implications.

Parental consent presupposes some form of arranged marriage. The cases quoted in this section illustrate several different varieties:

1. betrothal despite the opposition of the child to the marriage;
2. betrothal where the initiative in selecting a mate was made by the parent and the prospective spouse rejected by the child;
3. marriage without parental consent based on the mutual affection of the couple;



4. marriage where the approach was made to the parents and considered by them, taking into account the inclination of the child;

5. marriage where the initiative was made by the couple and approval sought from the parents.

These types seem to comprehend three variables: who took the initiative in making an approach (parent to child, child to child, parent to parent); weight given to the child's personal feelings (ignored, positive mutual liking required, only lack of dislike required); and who had the final word (parent or child). There was accordingly a wide range of variation which shows how imprecise for analysis is the expression 'arranged marriage'.

The extent of flexibility in these examples contrasts with the position of the first 'Book of Discipline' and the 'Directory' which only consider the situation where the child takes the initiative and seeks the approval of the parent. In this model the parent's action is limited by the ability of the Magistrate or Ministry to permit the marriage despite the parent's opposition, and the exclusion of certain reasons (inequality in estate and status) as adequate grounds for refusal. The child's position by contrast is stronger as in theory he cannot be married against his will (the impediment of force and fear) but can contract a valid marriage despite parental opposition. Both are based on the principle that the essence of marriage is the free and mutual consent of both parties.

The position in Scotland shows that arranged marriages did not necessarily preclude ideas about love, or that love necessarily implied conflict with the parents as happened in the elopement of Francis Ogilvie and Jean Scot. The 'Book of Discipline' recognises this by leaving the initiative to the couple whose hearts are touched with the

desire to marry. Parental consent was also limited to first marriages (and those under 21) by the 'Directory' so that there might have been greater scope for mutual affection in subsequent marriages. An example of mutual attraction is James Melville's second marriage contracted despite the reservations about their ages held by his uncle, Andrew Melville. In his letters to his uncle, James is quite explicit about his emotional involvement:

"Nor do I deny that I am in love; but it is a legitimate, holy, chaste, sober love .... I do not pretend that I am not under the influence of the affections, for how then could I be in love? ... She indeed is in the flower of life, being only nineteen years of age. And who that is wise would not prefer for a partner one who is sound in mind and body, modest, yielding, humble, affectionate, open-hearted, sweet-tempered, and thus every way qualified for rendering life agreeable?" 1 There is also no reason why 'love' should not develop within an arranged marriage. 2

Property played an important part in marriage. A person's estate was one of the factors affecting mate selection, others being his status, reputation, influence and personal qualities. Above all land provided the means to effectively exercise parental control over marriage, as it was the parent who arranged the marriage settlement and disposed of his estate through inheritance. The right of the father to dispose of his land as he thought fit was well-established, as was the use of this right to discipline children. Dirleton, for instance, considered that

"It were hard that the Father should not have power to divide his estate amongst his Children, and in Consideration of it to oblige

1. Quoted in: McCrie, 'Life of Andrew Melville'; 298.  
Cf. Foster. 'Ecc. Admin.'; 135  
Sibbald. 'Memoirs'; 71-72.
2. E.g. Marshall 'Duchess Anne'; 184, 185.

them to be dutiful". 1 In this he was following earlier legal writers, for example Craìg, who believed that all the most erudite lawyers

"are agreed that a father whose son marries without such consent may disinherit him and divide what would have been the son's share of the parental inheritance among his other children" especially as it was usual for the father to provide the necessary means for marriage out of his patrimony in consideration of the benefit accruing from his son's tocher. 2 Several cases previously cited include the threat of disinheritance, but it did not count as a ground for annulment on the basis of force and fear. For a son or daughter the possibility of disinheritance was a strong reason for seeking parental approval unless they had no expectations of an inheritance or had already received it, for instance, in the form of a formal education or an apprenticeship, particularly as land represented more than wealth. With the land was associated a particular rank in society with its attendant rights and obligations in the community.

The parent's interest in the disposal of his property was used to defend arranged marriages in several different ways. The first is used by George MacKenzie to deny that a Bishop's licence to marry without banns was a defence against lack of parental consent:

"else Bishops should innocently become the Instruments of Robbing us of our Children, and Estates, and of taking them away in such manner, as that parents can neither see their Daughters provided to competent Jointures by the Husband, nor the Husbands who marry them, sufficiently provided by the Father in Law". 3 To MacKenzie, it was the parents who had the necessary knowledge and skill to see that the marriage settlement was adequate. As it was their land which would form part of

1. Dirleton. 'Some doubts'; 143.
2. Craìg. 'Jus Feudale'; 832.
3. MacKenzie. 'Observations'; 398.

the settlement, it was reasonable for them to undertake the negotiations to ensure that the couple, and any future children, had sufficient means to live according to their status even when the wife was widowed.

These negotiations would also look after the interests of other kin. Marriage was a joining of two families to create a new web of kinship obligations so that the advancement of the kinship group was at much at stake as the future well-being of the couple. It was the failure to look after these wider implications that led to the cases of Jean Home, Jean Scott and Francis Ogilvie, and Janet Rocheid being heard before the Privy Council. Too many people had an interest in a marriage for it to be arranged by the couple on their own. Parental consent gave the opportunity for the interests of the kinship group as a whole to be considered.

It was also in the self-interest of the parents to see that their property was bestowed well so that their children could fulfil their obligations to them. In a case of rapt before the Privy Council it was argued that it would be

"ane most dangerous and evill example and consequence, if there be no surty to parents of their dearest interests and childrein; and when with great difficultie, paines and anxietie that they have brought them to that age that they may justlie hope and promise themselves comfort, their hopes shall be blasted and wicked persons encouraged ... to rob, seduce and take away from parents their childrein to the ruine and irreparable losse and greiff of their parents".<sup>1</sup> In return for their upbringing children were expected to look after their parents in their old age and infirmity at a standard appropriate to their rank. The child would be unable to meet this obligation if they married

1. 'R.P.C.'; I<sup>3</sup>, 139-140 (1662).

unwisely, that is, without their parents consent, and either never had or lost the estate which would have enabled the parents to have a comfortable old age. In many cases of rapt emphasis is placed on the seducer as a spend-thrift, revealing the parent's concern for their future as well as their daughter's. In some cases arrangements were made at the time of marriage and included in the settlement for the parent's old age.

Some form of parental control was necessary in marriage because it meant a change in possession of land which implied a reorganisation of obligations within the household, the wider circle of kin and in the community. Thus the parent had good reasons for making a subsequent settlement if the child married without parental consent. This would be that much more difficult as the chief bargaining counter - refusal to go through with the marriage - no longer existed. The best bargain was only obtainable if the parent had a free hand, which required that the couple advise their parents of their intentions before marrying. The principle behind parental consent was that it ensured the best bargain possible for all parties - the couple, their parents, and the kin of both families.

The application of parental consent shows that marriage was closely tied to the disposition of property. This was clearly recognised in the enactments of both the secular law and the Church, and is to be expected as the people who took part in the decision-making were owners of property and thus likely to be directly affected in their personal life by any changes. But it would be erroneous to see the members of Parliament and the Church as solely supporting their own self-interest and neglecting the interests of those who owned no property. Their motives were interpreted by themselves on a moral level. For instance, in a complaint anent an irregular marriage,

Sir John Nisbet (later Lord Dirleton) as King's Advocate, declared in the preamble that, whereas

"childrein and the right, interesse and power which be the law of God, nature and nationes, parents have and ought to have in the marriage of thier childrein that they may be bestowed in mariage with their advice and consent, being so great ane interest and of so universall concernment as to all persones of whatsomever quality and condition".<sup>1</sup> Their actions were interpreted as being in the best interests of everybody, including children, no matter whether or not they owned property. Parental consent was founded on universal law - the Old Testament image of the ruling patriarch in divine law, and the natural law of the mutual duties and obligations between parent and child. It was thus in the best interests of the nation that parental consent should be upheld, and transgressors condemned for such unnatural and sinful behaviour. Individual self-interest was subordinate in contemporary justifications to the well-being of society. This in itself illustrates the importance of the disposition and control of property in the social structure.

In principle parental consent to marriage was required for all regardless to which rank of society a person belonged. There are, however, reasons for supposing that its application differed in importance between different ranks of society, and even within the same rank. The final parental sanction was the threat of disinheritance, and its effectiveness depended on the expectations held by the child: the more the child felt he had to lose the more likely he was to accept parental control under the threat of disinheritance. In a simple model the higher the social rank of the parent the more likely would they be able to control their offspring's marriage.

1. 'R.P.C.'; III<sup>3</sup>, 341 (1671).

The inheritance of property can also be seen as a tangible manifestation of other benefits. The higher the rank of the child the more likely was it that the demands of adulthood would be greater. He would likely require a longer period of dependency to learn the social skills he would need to meet his adult responsibilities, and be more dependent on his parents and other kin for establishing social relationships and validate his claim to high status. Disinheritance could mean loss of status as well as wealth.

There are two qualifications that can be made to this simplistic model. The first is that the threat of disinheritance depended for its effectiveness on the perception of the potential loss. It cannot be split into those with or without property, or a certain amount of property. The child may have interpreted the value of the inheritance in terms of the potential change it could make to his status and standard of living rather than in monetary terms. To some people the acquisition of a cow or furnishings, for example, could have been worth as much as a 100 acres to someone else. The perceptions would vary with a person's prospective rank as an adult, personal ambition, and alternative means for self-advancement.

The second is similar except it is a horizontal rather than a vertical distinction. All the children of the same parent could not expect equal portions of the family estate, and preference was usually shown to the eldest son. The others may have received little, or were given it in a different form before they married. This could be a formal education so that they could make a career in the Church or State, an apprenticeship in a craft, or a clerical position with a merchant to learn the trade. It will be recalled that the General Assembly in 1644 expressed fears as to the choice of marriage partners by scholars. Scots law recognised the effect this had on parent/child obligations

in the term 'foris familiation'. According to Stair a child was emancipated by marriage, education in a distinct calling, "or if the Father countenance, or allow the Children to live by themselves and to manage their own Affairs apart, from whence his tacit Consent to their Emancipation may be inferred". 1 The same argument might also be applied to in-living servants as their small wages may have made possible a small cash saving to act as a dowry or wedding gift and counter-balance any benefits in the gift of parents. In general, if a child was not in the same household as his parents he was unlikely to receive a significant inheritance, but might require some form of consent from the head of the household, for example, the master of an apprentice.

The evidence in the preceeding section is insufficient to check the validity of, or modify, this model as the material is essentially illustrative. A much more detailed study of many marriages would be required, and even then the quality of the material would probably leave much to be desired. It requires more personal content than that usually found in marriage settlements or wills. There are unlikely to be many instances where personal material is combined with legal documents, as in the case of Ralph Josselin, to permit the necessary insight. It remains true, however, that there was a conscious link between the disposition of property and parental consent to marriage. This is clearly brought out in the settlement made by John Hoigis when he bound himself

"to renounce and overgive in favour of his said son the said Half Mains at the terms of Martinmas 1573, and the son binds him not to marry without the advice and tolerance of his father and mother. Should the son break this obligation, the Half Mains is to return to his father". 2 The importance of this was shown in the sociological

1. Stair. 'Institutes'; 42.

2. 'Prot.Bk.Johnsoun'; 171, no.879.



introduction: marriage was linked to inheritance, and was often dependent on or included arrangements for the retirement or old age of the parents, the maintenance of the widow, and the protection of the rights of any offspring. Parental consent was necessary to ensure that all these arrangements were made to the satisfaction of those who were to pass on property. Parental consent was essentially to control the marriage of heirs - what is less clear is the need for and the extent of kinship control over the marriage of non-heirs in systems of impartible inheritance, and why marriages without parental consent were not declared invalid.

#### 4.5. Deflowering of Virgins: a claim for marriage.

Both Canon Law and the Reformers believed that the Church had<sup>a</sup> duty to enforce the solemnisation of marriage after a valid betrothal had been made unless it was dissolved by the consent of both parties. The Reformers, however, introduced an additional ground for enforcement whereby the Church could compel a man who had deflowered a virgin to either marry her or provide her with a dowry. The basis for this was the Old Testament: in Exodus it was laid down that

"if a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife. If her father utterly refuse to give her unto him, he shall pay money according to the dowry of virgins." 1

This new claim was enacted by its inclusion in the first 'Book of Discipline'. The paragraph immediately follows that discussing parental consent:

"If any man commit fornication with the woman whom he required in marriage, then do both lose their foresaid benefit, as well of the

1. Exodus: XXII; 16, 17. See also: Deuteronomy; XXII, 28, 29.

Church as of the Magistrate; for neither of both ought to be inter-  
 sessors or advocates for filthy fornicators. But the father, or  
 nearest friend, whose daughter being a virgin is deflowered, hath  
 power by the law of God to compel the man that did that injury to  
 marry his daughter. Or if the father will not accept him by reason  
 of his offence, then may he require the dot of his daughter; which  
 if the offender be not able to pay, then ought the Civil Magistrate  
 to punish his body by some other punishment". 1 The 'foresaid  
 benefit' refers to arbitration by the Ministry or Magistrate in  
 instances where parental consent to marriage had been refused for  
 inadequate reasons, a point reinforced by the reference to the 'Church  
 as of the Magistrate'. The Reformers are not self-consciously in-  
 troducing an alteration to existing practice: the claim for marriage  
 by deflowering is considered within the context of parental consent  
 as an exception where a parent, or even a friend, could require marriage.  
 'But' is used because the parent takes the initiative while the child  
 is considered usually to take the initiative in approaching the  
 parents. The statement is restricted to repeating the law - ie the  
 Old Testament-except for the recommendation that secular courts should  
 punish bodily the impecunious offender. Virginity is seen as an  
 asset in a daughter as shown by the alternative of compensation.  
 That this was equivalent to the dowry suggests that a non-virgin was  
 a less attractive match. This is, however, taken from Exodus and  
 need not have been applicable to Scotland. Compensation also appears  
 to have safe-guarded the parents' position in that it provides an  
 alternative to agreeing to a marriage forced on them by the fornication  
 of the couple.

1. 'Bk.of Disc.'; 317.

Evidence for the application and interpretation of this part of the 'Book of Discipline' is slight - only 9 cases, all except one before 1565 and all from the Kirk Session Register of St. Andrews. It must be admitted, however, that these were the only kirk records examined which covered the period 1560 to 1575. Of the cases most (7) mentioned that a child had been born, and in all but one (George Grey and Janet Miller for which see below) provision was made for the child either by ordering the solemnisation of the marriage or by making special arrangements. For instance, ~~in~~ the case of William Peebles, his father accepted the obligation and expense of looking after the child as the girl's father had refused to accept William as a son-in-law because "he hes nocht in geir to paye her toucher". 1 A claim based on virginity was sometimes (3 cases) supplemented by a claim on the basis of a betrothal made without witnesses. In most cases (6) reference was made to the parent, or those 'in parenti loci'.

The Kirk Session of St. Andrews applied the law at a very early date - April 1560 - before the first meeting of the General Assembly. Their order to complete marriage was based on the authority of the "law of God" because "the woman alleaget hir to haif beine ane virgine ar he gat hir, and he culd say na thing in contrare thereof". 2 The first mention of an alternative remedy was in the case of Margaret Reid in 1563 when Thomas Cuthbert was ordered to solemnise marriage with her, or failing that

"to pay to the said Margaret twenty marchas, to toucher hir with ane other man ...; and to bair his charge of the barn gottin betwix tham as becummis him of dewete". 3 The authority of the General Assembly

1 'K.S.Reg.St.Ands(1)'; 224. (1564)

2. 'K.S.Reg.St.Ands(1)'; 29-30.

3. 'K.S.Reg.St.Ands(1)'; 185-186.

was not invoked by the Session until 1565 in the case of Gelis Moffat.

The pursued, Robert Thomson, argued in his defence that he could not

"be compellit of law equitie nor gud conscience to mary the said Gelis, without sche wald allege sum lawfull promis of mariaige and preve the sam".

The Session took the opportunity to emphasise the lawfulness of its action by

"the provision and ordinance maid be consent of the Generall Re-  
formit Kirk of Scotland, fundit and grundit upon the law of God anent  
the defloring of virginis, contenit and written in the Buk of  
Reformation, and be us resavit observit and put in practick be divers  
decretis of befoir". 1 No such mention has been found in the Assembly's  
records except for the decision of 1563 though this may be due to  
the quality of the material rather than an erroneous claim by the  
Session. It does emphasise, however, the importance attached by this  
Session to the first 'Book of Discipline' which is treated as an  
authority. 2

The General Assembly did not pass an act ordaining that men should  
marry women that they had deflowered. However, there is nothing in  
the first reference to deflowering in the General Assembly in 1563 to  
suggest that the procedure was regarded as novel. Thomas Duncanson  
had undergone public penance for fornication and the Assembly was  
asked if he could resume his duties as schoolmaster and reader at  
Stirling. The Assembly decided that the kirk session should ask the  
Superintendent on his behalf, and present his request to the next  
Assembly, and

1. 'K.S.R.Reg.St.Ands(1)'; 212, 214-215, 220-221.

2. The other cases which are not cited above are to be found in:  
'K.S.R.Reg.St.Ands(1)'; 142 (1562); 148-149, 178 (1562); 184  
(1563); 244-245 (1565).

"if the woman was a maiden with whom he had committed the said fornication, that he sall marie her if scho require the samein, in part of satisfactioun to the kirk".

The Assembly on the same day also heard a petition from a minister for his suspension from the ministry to be relaxed as he had married the virgin he had deflowered. 1 Some doubts about this procedure arose as it was questioned in the General Assembly of 1570:

"Q. Whither a man deflowring a virgine shall be constrained to marrie her; or, if paying her tocher, according to the discretione of the Kirke, he may be free to marrie whom he pleaseth in the Lord.

A. Let the Kirke suite the Magistrats to consent to this law." 2

The application of this law was the responsibility of the Church's courts and it is not clear what law was to be enacted. Possibly it was the recognition of deflowering as an offence so that refusal to accept the Church's decision was made punishable by civil pains as contempt. Alternatively the answer may have referred to the suggestion made in the 'Book of Discipline' that the Magistrate should inflict corporal punishment on offenders who could not pay the tocher if required. No record has been found of any suit to either the Privy Council or Parliament on the deflowering of virgins. It would appear that if such a suit had been made, it was unsuccessful. Certainly in the following year it was said that the "judiciall law is not yet receivit". 3

The last case in the records of the Kirk Session of St. Andrews was referred to the General Assembly in 1575, and it was possibly this case which led to the abrogation of the law on the deflowering of virgins. The Session was asked

1. 'B.U.K.'; I, 44-45, 50; see also 51.
2. 'B.U.K.'; I, 180.
3. 'B.U.K.'; I, 197.

"gif they wil obtempir and obey the chairge of the General Assemblie, forbidding to proceed in the action of Jonet Millar aganis George Grig anent the mareing or tochoring of hir, or at least to see quhat they think best to be don in the mater." 1 It is more likely, however that the Session's new-found doubt was the result of a decision given by the Assembly in August as the Session's referral is dated 31 August. The question put before the Assembly and its answer was -

"Q. Whither a young man, after he hes lyin with a young woman that is esteimit a virgine, na marriage preceidand, nor promise alledgit be her, be compellit be any particular Kirk, at the sute either of the woman or of the parents, either to marie her, or pay her tocher good. A. There is no law establischt, that the man should either marrie her or pay her tocher good." 2 No explanation is given for this denial of Mosaic Law which in other instances - for example, incest - was used as a touchstone for contemporary law. It shows that the Church of Scotland was not necessarily constant or fundamentalist in its approach to the Old Testament.

A possible reason for this abrogation is that the law was unworkable. Proving the offence was likely to be difficult - there needed to be proof of fornication, and that the woman was a virgin before the alleged fornication. If the man denied both, recourse could only be had to common repute. The lack of support from the civil courts would have made it difficult to enforce a session's judgement. The validity of such practical reasons was recognised by the Assembly in the second 'Book of Discipline' of 1581, which included the statement that Assemblies

1. 'K.S.Reg. St.Ands(1)'; 411.
2. 'B.U.K.'; I, 345.

"have power also to abrogat and aboleishe all statutis and ordinances concerning ecclesiasticall materis, that ar fund noisum or improfitable, or aggrie not with the time, or (ar) abuset be the peple". 1

The Assembly may also have been concerned with the more fundamental conflict between the enforcement of marriage because the prospective bride had been deflowered and the theological essential that marriage consisted of the free and mutual consent of both parties. There was no need under this law to prove a promise of marriage, or even of its existence by implication. In this it differed from the enforcement of solemnisation subsequent to a betrothal and the common law proofs of marriage. Perhaps the contradiction was within Mosaic law rather than between the Old Testament and problems of enforcement.

The Reformers introduced in the first 'Book of Discipline' a new claim for marriage on the grounds of deflowering. It was not enacted formally by the General Assembly which abrogated the law in 1575. The Kirk Session of St. Andrews dealt with a small number of cases, starting before the first meeting of the Assembly. Most of the cases were heard before 1565. The reasons for the abolition of the law are not known, but it does illustrate that the laws of the Old Testament were not necessarily held as divine law. The practice of marriage or a dowry appears to have been part of medieval English canon law, and was certainly included in the law of King Alfred. 2

Nearly all of the cases resulted in provision being made for the support of the illegitimate child, and it is probably significant that most cases included a bastard rather than just fornication. Bastardy was more important to the complainers than the loss of virginity. The application of the law ensured the child was cared for: by marriage of the parents, or by providing the mother with a dowry to marry someone else; or by being taken in by one of the parent's

1. 'B.U.K.'; II, 498.

2. Bloch. 'Sexual life'; 53.

May. 'Social control'; 86.

families; or by fixing the financial obligations of the father. The problem of fitting a bastard into a society organised on a familial basis was thus solved by a number of expedients, all based on the idea that the support of the child was the father's responsibility as would be expected in a patriarchal society.

#### 4.6. The marriage service.

##### 4.6.1. Versions.

An innovation made by the Reformers was the introduction of a prescribed and set marriage service. The two main versions which were officially used by the Church of Scotland at different times were those contained in the 'Book of Common Order' and in the 'Directory'. In addition there was an amended version of the English service prepared by 1619, but never printed or used, and the 'Prayer Book' of 1637 which during its short period of use was associated with great controversy. Some Scots also used the English 'Book of Common Prayer'. 1

The 'Form of Marriage' in the 'Book of Common Order' was accepted as the uniform order for the solemnisation of marriage by the General Assembly in 1562. Its approval was reiterated in 1564 when the Assembly ordained that every minister, exhorter and reader should own a copy. This marriage service was not produced by the Reformers specifically for the Church of Scotland: it was taken from the 'Book of Geneva', which was based on the 'Book of Prayer' and Calvin's Genevan 'Liturgy'. These were derived in their turn from a service prepared by Farel at Neuchatel in 1533. This marriage service thus emphasises that the Reformers were very much part of the Reformation on the Continent. 2

The idea of revising the service was certainly mooted by 1615

1. Donaldson. 'Scott. Reformation'; 49  
McMillan. 'Worship'; 47.
2. 'B.U.K.'; I, 30, 54.  
McMillan. 'Worship'; 266.



when Spottiswoode, Arch\_bishop of Glasgow, included the suggestion in a paper. The General Assembly named a commission in the following year to prepare a revision of the English 'Book of Common Prayer'. It was originally intended that the 'English' version of the marriage service should be retained unaltered. However, it was amended. The work was principally done by William Cowper, and it was completed by 1619. The service was never printed, probably because of a compromise reached between James VI and the Church of Scotland. The General Assembly of 1621 ratified the Articles of Perth in return for an assurance by the King's Commissioner that James would never intend any future alteration in the Church's liturgy. 1

It was left to Charles I to impose the 'English' marriage service on the Scottish Church. The service in the Prayer Book of 1637 differs only slightly from that in the English 'Book of Common Prayer' - for instance, the use of 'presbyter' instead of 'priest' and 'in the face of his Church' instead of 'his congregation'. Nevertheless the 'Prayer Book' as a whole owed its chief characteristics to the Scottish bishops, and not to Charles I or to Laud. Its authorised use was short-lived: the Privy Council enjoined its use in December 1636 and in September 1638 the King forbade its use and it was condemned by the General Assembly in December of the same year. 2

The last version of the marriage service considered is contained in the Westminster 'Directory'. Its adoption was much more lasting despite the unusual circumstances in which it was drafted, and it continued to be the official prayer book of the Church of Scotland after the Restoration. The 'Directory' was meant to be the prayer book for the church of the three kingdoms united by the Solemn League and Covenant. It was thus not intended as a peculiarly Scottish prayer

1. Sprott. 'Scott.Liturgies'; xv-xvi, xxii-xxiv, xxxiii-xxxv.
2. Donaldson. 'Making of the Prayer Bk.'; 78, 338-339.  
    'R.P.C.'; VI<sup>2</sup>, 353; VII<sup>2</sup>, 64, 65.  
    'G.A.Acts'; 9.

book. The Westminster Assembly of Divines, however, did include influential Scots and there was the lever of the military alliance with the English Parliament. In February 1645 the Scottish Parliament interposed its authority to the ratification of the 'Directory' by the General Assembly, and approved it "hertilie and cheerfullie" "without a contrary voice". 1

#### 4.6.2. Structure.

Each of the four marriage services can be broken into a number of distinct parts as in table 2.

Table 2.

'Bk of Cn. Order.	1619 Draft	1637 'Prayer Book'	1645 'Directory'
Exhortation	Exhortation	Exhortation	Prayer
Impediments	Impediments	Impediments	Exhortation
Promise	Promise	Promise	Impediments
Exhortation	Exhortation	Vows	Promise
Blessing	Prayer	Ring	Prayer
Psalm 128	Psalm 128	Joining of	(for blessing)
or other	Blessing	hands	
		Blessing	
		Psalm 128 or 67	
		Prayer	
		Prayer	

1. 'A.P.S.'; VI, pt.I, 309,446.

'Bk. of Cn. Order (contd)	1619 Draft (Contd)	1637 'Prayer Book' (Contd)	1645 'Directory' (Contd)
		Prayer  Blessing  Communion  Exhortation	

1

This shows that there were certain common elements - the exhortation, the asking for any impediments, the exchange of mutual promises, and the invocation of God's blessing. The exhortations consist of sermons on the institution, use, and ends of marriage. They take the form of set pieces replete with biblical quotations except for the 'Directory' where only the subject matter is given. The second exhortation after the promise concerns the conjugal duties, which in the 'Directory' are covered in the first and only exhortation. The promise is always preceded by an invitation to the congregation to make known any impediments. In the absence of any impediments the couple then exchanged their mutual consent. In all versions, except that of 1637, the promise includes the declaration that it is made before God and in the presence of his congregation. The last common element is the blessing, which in the 'Directory' is given as a prayer and differs slightly in content.

The table also emphas<sup>is</sup>es that the service of 1637 was much more elaborate. There were various elements which were regarded as Popish - the inclusion of communion, the laying of the ring upon the Prayer Book and the use of responses in the first prayer with the couple kneeling before the 'Lord's Table'. The service was made much more of a ritual with greater prominence being given to the

1. 'Form of Marriage' in Knox, 'Works; IV, 198-202. This version is exactly the same as that printed in the 'Bk. of Cn. Order.' Draft of 1619 in Sprott, 'Scott. Liturgies'; 76-83. 'Prayer Bk. 1637'; 223-229. 'Directory'; 312-315.

minister. He does not so much lead the congregation as officiate over the service. The ritualism is also illustrated by the ornateness of the language, a point which cannot be brought out by a tabulation. The service in the 'Directory' is by comparison much simpler, being reduced to the basic elements by the omission of the Psalm included in the other three versions of the service. This characteristic is also reflected in its language.

#### 4.6.3. Exhortation.

The exhortations in the 'Book of Common Order', the 1619 draft and the 'Prayer Book' of 1637 are a potted theology of marriage as presented to the couple and congregation on the day of marriage. 'The 'Directory' does not give a set piece and the minister is allowed to use his own words.

These three exhortations are all based on the same verses of scripture and often borrow phrases and paragraphs from each other. The draft of 1619, for instance, draws on the 'Book of Common Order' and includes passages later incorporated in the 'Prayer Book' of 1637. It uses the second exhortation of the 'Book of Common Order' with only a few changes. In the first paragraph of its opening exhortation, the first half is basically the same as the 'Book of Common Order'. The second half uses the same biblical quotations as were included in the second exhortation of 1637. This demonstrates the uniformity of the basic theological interpretation of marriage as contained in these three services: the differences are largely of expression and not of premises. It is reasonable, therefore, to combine these three sources when considering the theology of marriage which can be divided into two - the institution and use of marriage, and conjugal duties.

Marriage was said to have been instituted by God before man's fall, after he had created earth, its plants and animals, and placed Adam in lordship over all things. God saw that it was not good that man lived alone so he fashioned a helper called Eve from one of Adam's ribs while he was sleeping. Woman was created to be a help and comfort to man, and was the reason for a man leaving his parents (Genesis I, 28; II, 18, 21-22, 24. Matthew, XIX, 5. Mark, X, 7. I Corinthians XI, 8-9. I Timothy II, 13.).

There were three principle uses of marriage. The first was as a remedy against sin - to avoid fornication. People who did not have the gift to remain chaste and to keep their body, the temple of God, undefiled were enjoined to marry rather than burn. (I Corinthians III, 16-17; VI, 13-20; VII, 2. I Thessalonians IV, 3-5). The second was for the procreation of children who were to be brought up in the fear and nurture of the Lord (Ephesians VI, 4). The three services use the same gloss on Ephesians V, 29-33, to describe the last purpose: a signification of the "mysticall union that is between Christ and his Church". Eve was created out of Adam, and similarly in marriage a couple were so joined that they became one body, one flesh and one blood. The unity between Christ and his Church was a spiritual marriage whereby its members became one flesh with Christ.

Two main images formed the basis for conjugal duties. Eve had been created by God to be a comfort and help to Adam, and thus one of the duties of the wife was to please her husband. In the 'Prayer Book' of 1637 was included, as part of the final prayer, the supplication that

"this woman may be loving and amiable to her husband as Rachel, wise as Rebecca, faithful and obedient as Sara, and in all quietness, sobriety, and peace, be a follower of holy and godly matrons". 1

1. 'Prayer Book 1637'; 228.

The second was the mystical union of Christ and his Church signified by marriage. For the wife this meant obedience to her husband. As Christ was head of the Church and therefore subject to him, so also were husbands heads of their wives and they subject to them. This point was particularly emphasised in the draft of 1619 and the 'Prayer Book' of 1637, and supported by forthright scriptural quotations: for instance, Ephesians V, 23, "Wives, submit yourselves unto your own husbands, as unto the Lord." The promise of obedience was also included in the marriage vow of all four services. (Also based on: Esther II, 17, 20-22; I Corinthians XI, 3; Hebrews XIII, 17; Colossians III, 18; I Peter III, 17.) This subjection is emphasised so much that it is tempting to believe that this was because few wives did obey their husbands in practice.

The mystical symbolism also gave the parameters to the husband's duties to his wife. The husband was expected to love his wife as Christ loves his Church, and as his own body because they were one flesh. This is reflected in the marriage promises. In the 'Book of Common Order' and draft of 1619 the husband promised to love and entreat his wife and in the 'Prayer Book' he is asked if he will love, honour and comfort her. Love should not be interpreted in the context of romantic love but as similar to the way Christ loves his Church. It had the meaning of attachment, warm affection and respect. Respect because husbands were expected to honour their wives as the weaker vessel (I Peter III, 1-7.).

Both husband and wife vowed to forsake all others during the lifetime of their spouse: adultery would be a breach of the marriage promise. This was also implicit in marriage through their union into one flesh. Marriage was of such virtue and force according to the first exhortation in the 'Book of Common Order' that

"the housband hathe no more right or power over his own bodie, but the wife; and likewise the wife hathe no power over her own body, but the housband". 1 The spouse was entitled to sexual relations as a right or a debt to be rendered. Marriage was after all a remedy for the sin of fornication. (I Corinthians VII, 4; Hebrews XIII, 4.)

In all three versions the indissolubility of marriage is emphasised. The common quotation is Matthew XIX, 6: "What therefore God hath joined together, let no man put asunder". It was a fast and sure knot that was only loosened by the death of the spouse. This was not qualified in any of the three services, although the Church of Scotland introduced divorce using the verses that followed in the same chapter of Matthew as the scriptural justification. The indissolubility of marriage remained the ideal (Malachi II, 14-15; Romans VII, 2-4; I Corinthians VII, 10-11, 39).

#### 4.6.4. Summary.

The three versions of the marriage service - the 'Book of Common Order', the draft of 1619, and the 'Prayer Book' of 1637 - shared the same basic theology of marriage. This was presented within a structure which varied, the simplest being that of the 'Directory' of 1645. All four services included an exhortation, the declaration of any impediments, the exchange of marriage vows, and a blessing. The view that marriage was not a sacrament did not mean a change in the basic beliefs regarding the institution, use and duties of marriage.

Ideally marriage was only dissoluble by the death of a spouse, and the wife was subordinate to her husband. This interpretation was derived largely from the New Testament and the first two chapters 1. 'Bk. of Cn. Order'; 199.

of Genesis, and was only slightly different from that in William Hay's 'Lectures on Marriage'.

The marriage services also confirm that the essence of marriage was the exchange of mutual consent. The minister leads the congregation and the couple through the solemnisation of marriage but does not make them husband and wife. As the 'Prayer Book' of 1637 expresses it -

"Forasmuch as N and N have consented together in holy wedlock, and have witnessed the same before God and this company, and thereto have given and pledged their troth either to other, ... I pronounce that they be man and wife together".<sup>1</sup> It was God who joined the couple together and not the minister. It therefore followed that the solemnisation or blessing of marriage was not necessary for its validity, though it was advantageous as the promises were made before witnesses.

The theology recognised the part played by marriage in restructuring familial relationships. Genesis II, 24 says that

"Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." Marriage was the event that marked a child's assumption of independence from his parents. The implication appears to be that the normal adult status was that of marriage and that an unmarried adult was an anomaly.

#### 4.7. The attitude of the authorities to marriage festivities.

The attitude of the authorities is expressed in the attempts made to control the expense and disorders that occurred during the celebration of marriage. This particularly applied to penny weddings, where the guests made a contribution (lawin) to the cost of the refreshments and music. Penny weddings were common where the newly

1. 'Prayer Bk of 1637'; 226.



married couple were servants. The accounts kept by Sir John Lauder, for instance, include several entries between 1670 and 1674 for contributions to penny weddings of his own and other people's servants. On 23 July 1674, for example, he noted

"given by my wife and my selfe, at Mary Scot, my fathers serving woman, hir pennie wedding ..... 2 dolars

Item, to the fidders ..... 6 pence" 1

The association of penny weddings with servants seems to be supported by one of Nicoll's observations -

"This last harvest 1665, by Godis providence, producit great numberis of cornes and very chaep, quhilk wes the caus that a number of feyet servandis, both men and wemen, did marry at that Martimes thairefter, be way of penny bridelis, both within the Town of Edinburgh and uther pairtes of the cuntrey." 2 Nicoll implies that hired servants were encouraged to marry in November rather than in the spring or summer because of the cheaper cost of grain, and that their marriages were celebrated by penny bridals.

The main characteristics of a bridal were food, drink and dancing. Taylor records a bridal ballad in his account of his journey to Edinburgh and this includes a long list of dishes, especially fish. The last verse ends

"When weary with eating and drinking,

We'll rise up and dance till we die."

(Taylor. 'Journey'; 144 (1705). The verse was probably copied from a broadside which was probably written by Sir William Scott of Thirlestane.)

The same kind of festivities were probably part of the wedding celebrations where the cost was borne by the families of the couple.

1. Lauder. 'Journal'; 274.

2. Nicoll. 'Diary'; 441-442.

Another English traveller noted that

"after marriage there will be continual feasting and mirth for some 4 or 5 days together, during all which time there will be presents offered to them, as all kinds of household stuff, feather beds, pots, pans, etc., and goods, as sheep, oxen, horses, kine, etc often to the value of 500/1. sterling". 1

There were probably marriage customs peculiar to particular localities. At Lenton, Thomas watched a marriage procession where the

"man and his company walked first, and the woman led by two men, with her train of women followed. Before the man went a curious concert of music, consisting of a bagpipe and a fiddle; but before the woman and her attendants was only a single solemn bagpiper. The only piece of ceremony we saw performed was their breaking a cake over the Bride's head as she entered her house, and then scrambling for it". 2

#### 4.7.1. The State.

Many of the acts and ordinances anent bridals were passed at the local level by kirk sessions and burgh councils, and an interest was shown on some occasions by the General Assembly. The involvement of the Privy Council and Parliament was less marked.

Bridals were included in the sumptuary legislation. An Act of 1581 against 'superfluous banquetting and the inordinate use of confectionery and drugs' forbade the use of foreign confectionery at the weddings of any below the rank of landed gentleman. 3

This act was repeated by the Privy Council in 1595, a time of shortages and poverty. Fines were to be levied on the master of the house and partakers as well as on the offender. 4

1. Lowther. 'Our Journey'; 83 (1629).
2. Thomas. 'A Journey': 125 (1725).
3. 'A.P.S.'; III, 221.
4. 'R.P.C.'; V<sup>1</sup>, 244-245.

The ban was introduced again by an Act of 1621. Clause 17 forbade the use of

"anye maner of deserte of wett and dry Confectionounes at Banqueting mariages, Baptismes feasting, or anye meallis, except the fruttis growing in Scotland".<sup>1</sup> The legislation shows that bridals were associated with feasting, including special dishes imported from abroad. The reasons for forbidding the use of foreign confectionery were not specific to the secular celebration of marriage. The conspicuous display of expensive feasting was felt to be inappropriate during a period of dearth and poverty.

Penny weddings were not exempt from the powers of the Justices of the Peace to fix prices and wages. It was within their power to set a maximum amount that could be collected from each person as lawin, something that had already been undertaken by some kirk sessions. The Privy Council in 1612 decided that the determination of the ordinary at penny bridals should be reserved to Justices of the Peace.<sup>2</sup> The same power was given in instructions by Parliament to JPs in 1655, and it was repeated after the Restoration in 1661 when Parliament instructed them

"to set a price upon craftsmens work and upon ordinars of penny bridals, together with the price of Shearers fies."<sup>3</sup>

There appears to have been only one occasion when Parliament took a particular interest in bridals. In 1681 an Act was passed for 'restraining the exorbitant expence of Marriages, Baptisms and Burials'. There may have been an Act previous to this one as the Kirk Session of Humber in August 1654 ordained that

1. 'A.P.S.'; IV, 626.
2. 'R.P.C.'; VIII<sup>2</sup>, 327.
3. 'A.P.S.'; VI, pt II, 834; VII, 309.

"ane speciall care should be had of putting in execution the Act of Parliament for restrainng the great number of people at pennie bridles; and that the persons befor they be married, should enact themselves and find caution not to exceed the number specified in the said Act." 1 No such Act, however, has been traced for the Scottish Parliament, and though Scotland had been united with England into one Commonwealth on the 12 April of the same year, there does not appear to be either an Act passed by the Commonwealth. The Session was probably referring to an act passed by the General Assembly in 1645.

The title of the Act of 1681 implies that it was sumptuary legislation. The preamble supports this by referring to the

"the great hurt & prejudice ariseing to this Kingdom by the superflous expence bestowed at Marriages, Baptisms and Burials." The clauses were mainly concerned with regulating the number of people who attended. The strictly sumptuary clauses included a ban on more than two changes of clothing by the couple, and their parents and relatives at marriages, and restrictions on honours and clothing at funerals.

The regulation of numbers was intended to ensure that marriages, baptisms and funerals were "solemnised and gone about in somber and decent manner". The Act ordained that

"besids the married persons, their Parents, Children, Brothers and Sisters, and the familie wherin they live, Ther shall not be present at any Contract of marriage, Marriage or In-fare, or meet upon occasion thereof above Four Freinds on either side with their ordinary domestick servants".

Penny bridals are not specifically named and the restriction on numbers applied to the different celebrations associated with marriage.

1. 'K.S.Reg.Humbie'; 443.

The guests are restricted to the immediate family and a few kin or neighbours. The children of the spouses are presumably those of previous marriages rather than bastards, and their specific inclusion shows that remarriage was not exceptional. It is also interesting that mention is made of the family with whom the spouses co-resided. This would cover instances where the spouse lived with kin because he or she was an orphan or to be nearer a place of education, or lived with non-kin as a servant. The latter implies that a resident servant was equated in terms of the relationships within a household as almost one of the family. The inclusion of domestic servants of the four friends also emphasises that servants were not mere employees. It is to be expected that servants would travel with their masters and mistresses to look after their needs, but not that they would actually take part in the celebrations.

Similar restrictions on numbers were applied to baptisms. The family wherein they live is replaced by "those of the family", and the four friends on either side by not above four witnesses. It is not possible to say if this Act treated marriage as more important socially than baptism. If 'those of the family' permitted all and any kin to attend, this would imply that baptism was given preference over marriage. If, however, 'those of the family' meant 'those of the family wherein they live', this would imply that marriage was socially more important than baptism because kin and their servants were permitted to attend marriage celebrations. The numbers were not so restricted at funerals. The numbers of mourners and the number of guests permitted varied with the social rank of the person being buried - for instance, a maximum of 100 noblemen and gentlemen and thirty mourners at the burial of a nobleman, bishops and their wives. The Act thus appears<sup>p</sup> to imply that funerals were of more importance

to the community than marriages, especially funerals of people with high social status.

The penalty for exceeding the numbers permitted at marriages was a fine, graduated according to social status and means. Landed persons were liable to a quarter of their annual<sup>a</sup> valued rent and persons without land to a quarter of their moveables. Burgesses were to be fined according to their means, but not exceeding 500 marks Scots. Craftsmen and servants were liable to a maximum fine of 100 marks. These fines show that the Act was to be applied to all weddings, irrespective of the social rank of the couple and whether or not they were penny bridals. The only occasion when mention is made in the Act to penny weddings is the clause which establishes a penalty of 500 marks on the master of the house or inn within a burgh and its suburbs, or within two miles of the same, wherein the numbers of persons attending a penny wedding exceeded the numbers laid down in the Act. Presumably if the house was more than two miles away from the burgh, the master of the house did not commit an offence. 1

The Privy Council had occasion to enjoin the Act's strict enforcement twice within seven years of it being passed. In 1684 the Council issued a proclamation forbidding penny weddings under the penalties of 1681. Judges and magistrates were strictly required to enforce the Act under the threat of being summoned before the Privy Council for neglect. The proclamation was said to be necessary because

"diverse persones have presumed, even since the date of the said act, to make penny weddings where great confluence of our subjects have resorted, which is a most extravagant expence to our leidges." 2

Four years later the Privy Council was faced with the same problem - despite the Act of 1681.

1. 'A.P.S.'; VIII, 350.

2. 'R.P.C.'; VIII, 496-497.

"divers persons, Vintners and others, have, and still continue to contraveen so necessary and useful a law, to the great contempt of Our Authority".

The further proclamation of 6 December 1687 again called for the Act "to be put in full and vigorous execution ... in all points", and ordered the Act to be reprinted. 1 On this occasion the Burgh of Peebles was apparently stirred to action as the following month, January 1688, they found guilty and fined under the Act of 1681 fifty-four people, including the parson of Peebles. 2

#### 4.7.2. The Church.

The information obtained from the printed sources which were used appear to support the view that it was not until the seventeenth century that any acts were passed by the Church to regulate the secular celebration of marriage. The initiative was taken by kirk sessions and presbyteries rather than by the General Assembly. The Assembly's records show that an act was passed in 1645, and that further attempts were made in the 1700's to restrain abuses at bridals. The material, however, is very patchy - for instance, the early part of the seventeenth century is represented only by records from Stirling. This is a reflection of the sources examined: a thorough search of printed and manuscript records of kirk sessions, presbyteries and synods would probably reveal many more acts, especially for the Restoration period. But it would not explain the absence of any acts anent bridals in the records of the General Assemblies 1560 to 1617 and 1694 to 1700, and in the kirk session register of St. Andrews to 1600. The Assemblies may have regarded the regulation of bridals as already being covered by acts against specific offences, for instance

1. S.R.O. RH14/228.
2. 'Peebles Burgh Recs.'; 120.

drunken<sup>n</sup>ness and profaneness, or as being proper to the discretion of the lower courts of the Church. The regulation of bridals may have been considered as part of Sabbath observance and the question of marriage on a Sunday. An example of this is the supplication made by the Session of St. Andrews to the magistrates in 1570

"for guid ordour to be takin in time cuming for reformatioun of the grite abuse usit be new mareit personis in violatioun of the Sabbat day" who "perturbis the town witht rynning thair throw in menstralaye and harlatrye". 1

The material that has been extracted on the restraint of bridals by the Church falls into three parts - the efforts of the kirk session of Stirling, the General Assembly's act of 1645, and the attempts by the Assembly in the 1700's to restrain abuses at penny weddings.

The act of 1600 passed by the Session of Stirling was concerned with restraining disorderly behaviour associated with bridals and, like the Justices of the Peace, with fixing a maximum sum to be taken as lawin. This act was occasioned by the Session finding that

"thair hes bein great dansing and vanitie publictlie at the croce usit be mareit persones and thair cumpanies on their mariage day".

The cross was the place for public proclamations and the dancing may have served to proclaim the couple's new status to the community. The Session ordained that no-one should be married in the church until they had consigned £10 as security. £10 would be confiscated if the lawin exceeded five shillings "according to ane former act", and £5 would be confiscated if any public dancing took place. A security of only £5 against public dancing was required for bridals which were "maid frie without payment". 2

1. 'K.S.Reg.St.Andrews (1)'; 341.

2. 'K.S.Reg.Stirling (1)'; 135-136.



The scale of fines suggests that the Session believed that the greatest cause of disorder was the amount of money paid as <sup>a</sup> ~~l~~win. The former act referred to need not necessarily have been made by the Session - it could refer to an act by the Magistrates or Burgh Council. The act also recognises that not all marriages involved penny weddings, and that these could also lead to dancing in the streets.

An attempt to regulate different aspects of the <sup>f</sup>celebrations was made in 1608. In this case the initiative was made by the Burgh Council of Stirling and later endorsed by the Kirk Session. On the 1 December 1608 the Session ratified the act anent bridals passed by the Council on 28 November and engrossed it word for word in its records. It supported the act with its own authority as requested by ordaining that no testimonials (which were required by persons marrying outside their home parish) should be given unless all the conditions of the act were fulfilled. 1 The Council ordained that all persons who had their banns proclaimed should make their banquets and bridals within the burgh under the penalty of £20 if both the man and the woman lived in the burgh or parish of Stirling. Where an inhabitant married an "outland woman", he was required under a penalty of £10 to invite no more than 20 persons or neighbours from the burgh. The Session was required to take £1 before granting a testimonial in this case and similarly where an "outland man" married a woman from the burgh. In the latter the bridal or banquet was to be made within the burgh under the penalty of £20. 2 The act's main principle was that the bridal or banquet, like the church service, should be held in the bride's parish. It is not clear why the Burgh or Kirk Session would want to enforce this by law, or to restrict the number of guests going to a wedding outside the town. Perhaps people

1. 'K.S.Reg.Stirling (2)'; 450.
2. 'Burgh Recs.Stirling'; I, 121.

were avoiding restrictions on celebrations within the burgh by holding them outside the Council's or Session's jurisdiction in places where enforcement was slacker.

The regulations of 1600 were the basis for further acts by the Kirk Session over the next 40 years unlike those of 1608 which are not mentioned again. In 1621 the Session re-enacted the security and penalty anent public dancing and a maximum lawin of five shillings. The Session also added penalties for failure to solemnise marriage within forty days of the first proclamation of marriage and for ante-n<sup>p</sup>utial fornication. 1 The act was not allowed to fall into desuetude as an act "anent Bridaill lawingis to be reducit to the old order "is included in a memorandum of Session acts of 1642. The list also includes an untraced act anent 'pipers accompanying persons to be married'. 2 The session continued to cooperate with the Burgh Council. On the 13 April 1646, for instance, the Council forbad

"all conventioun and meiting of people at bridellis fra this furthe, except thre or four with ilk pairtie, and acquent the kirk sessioun to do the lik". 3 On the same day in fact the Session ordained that intimation should be made about the restraint of penny bridals for the same reason as before - "they have been the occasion of exces and profanitie". 4 Both are perhaps associated with the General Assembly's act of 1645. Three or four seems to be a particularly impractical number unless this was in addition to members of the close family as in the Act of 1681 where the number was also four. It is a marked reduction from the 20 permitted in 1608 for a man marrying outside the burgh. The Council also showed an interest in fixing

1. 'K.S.Reg.Stirling (2)'; 460.
2. 'K.S.Reg.Stirling (2)'; 479.
3. 'Burgh Recs.Stirling'; I, 190.
4. 'K.S.Reg.Stirling (2)'; 481.

the lawin, which had been set by the Session in 1608 and 1621 at five shillings. In 1653 the Council set the maximum lawin at eight shillings in contrast to the twelve shillings said to be usually taken. 1

These records from Stirling show the local Kirk Session and Burgh Council working together to regulate on their own initiative the secular celebrations associated with marriage. They were particularly concerned with public dancing and the amount of lawin. Action was also taken to restrict the number of guests, to ensure that the bridals and banquet were celebrated in the bride's parish, and anent pipers. The method of enforcement was the taking of a security and the granting of testimonials for marriage outside the burgh on certain conditions. Local initiative appears to have been characteristic of attempts to restrain the abuses at weddings. It is particularly striking that the General Assembly's act of 1645 did not specify penalties and offences to be applied uniformly by the lower Church courts. This may be because the local courts had developed their own particular laws which were better left untouched than reduced to a uniform order. The General Assembly shared the same fears as had prompted action by the Kirk Session and Burgh Council at Stirling. The preamble to the act presents a perturbing interpretation of wedding celebrations -

"the great profanitie and severall abuses which usually fall forth at pennie bridals, proving fruitfull seminaries of all lasciviousnesse and debaushtrie, as well by the excessive number of people <sup>con</sup>veened thereto, as by the extortion of them therein, and licentiousnesse thereat, to the great dishonour of God, the scandall of our Christian profession, and prejudice of the countrey's welfare".

1. 'Burgh Recs. Stirling'; I, 210.

The Assembly ordered as a remedy that every presbytery take particular care to restrain these abuses, and to ensure at parish visitations that every session and minister made a strict account of their obedience to the ordinance to the presbytery. 1

The application of the General Assembly's act can be illustrated by two examples. In 1645 the Synod of Fife commended an act passed by the Presbytery of St. Andrews anent the restraint of penny bridals to the number of twenty persons and ordained that it should be extended to the whole province. The act had been passed by the Presbyteries two years before the act of the General Assembly. In 1646 the Synod ordained again that it should be put in practice throughout the province, <sup>and</sup> be publicly read in every pulpit. The preamble complained of

"the great abuse that still is amongst the most parte of the communes, by gathereing of multitudes to Pennybridles, not withstanding of several actes made against the same by Justice of Peace and Presbytries".

The ministers were ordered to apply the act of the Justice of the Peace which restricted the number of persons to twenty, and to take a security at the handing in of banns. Sessions were also ordered to restrict the numbers at baptisms and contracts to six or seven because of the multitudes attending them. Sessions were to censure hostlers who provided the feasts on such occasions. 2

In February 1647 the Kirk Session of Humble read and engrossed in its register an act passed by the Presbyteries of Haddington and Dunbar in obedience to the General Assembly's act anent the restraint of abuses at penny bridals. This second example is much longer and more detailed. Like the act of the Synod of Fife - and the earlier acts of the Stirling Session - the Presbyteries recognised a need for the

1. 'G.A. Acts'; 129.

2. 'Synod of Fife'; 142, 148.

assistance of the civil magistrates. The Presbyteries recommended to all magistrates and others with civil power to interpose their authority with that of the Church and to pass a special act anent penny bridals ordaining .

"under the penaltie of twentie pounds to be exacted of the saide persones that sall be found guiltie to the use of the poore, that in time coming the number of persones convened to pennie bridles exceed not twenty; that the prices thereat be not above 12s. the man, and 8s. the woman; that there be no piping or dancing at all befor or after dinner or supper, and no staying of persones for drinking the dinner or supper being ended: and withall that there be no lowse speeches, filthie communication and singing of badie songs or prophane minstrelling in time of dinner or supper."

The same restriction to twenty people as the Synod of Fife suggests that there existed a general act ordaining this number under the authority of Justices of the Peace. The act envisages a rather sombre celebration consisting of a bridal meal for a few people without dancing or music. It shows that the Presbyteries really did see penny bridals as the "seminaries of all profanation within our bounds " and were not indulging in rhetoric for its own sake. The Church for its part undertook to impose ecclesiastical censures in the kirk session on all persons found guilty of such offences. The bridegroom, and master of the house where the bridal was to be held were also required to appear before the Session and undertake to be answerable for all persons at the bridal and to give obedience to the act. They were further required to consign £20 (or at least find caution) which would be confiscated for the use of the poor if any offence was committed. 1 Other Presbyteries no doubt passed similar acts which

1. 'K.S.Reg.Humbie'; 435-437.

would have been traced if their records had been searched. There must also exist the acts made by Justices of the Peace.

The lacunae before the efforts of the revived General Assembly in the 1700's should not be taken to mean that attempts were not made to restrain abuses at penny bridals after the Restoration. The Act of Parliament of 1681 discussed above shows that attempts were made to regulate the number of guests. The material from the previous fifty years suggests that action would have been taken at the local level in both enforcing existing acts and enacting new ones. Kirk session records for this period were not examined.

The General Assembly in the 1700's did not make any new acts anent bridals, which suggests that the lower Church Courts had maintained or modified the ordinances enacted before - or after - the Restoration. Their first concern was to see that the existing laws were enforced. The commission of the General Assembly in 1700 included the request "to revive former Acts of Parliament against abuses at pennie weddings". Presumably the Act of 1681 was not being enforced. The same Commission claimed that the law against profaneness had never taken effect because many parishes had been negligent in nominating magistrates. A similar explanation may be applicable to the laws anent bridals. Although the Commission was referred to the Committee for Security, no Parliamentary action appears to have been taken. 1

It was possibly this failure which prompted the General Assembly in the following year to revive its own act of 1645 for restraining abuses at penny bridals together with the act of 1645 against likewakes and the act of 1649 forbidding the dancing of both sexes together. These acts were to be read out in church. Synods were to ensure the diligence of the Presbyteries, and to inquire of them what further action may be required. 2

1. 'A.P.S.'; X, app 47-48; 208.
2. 'G.A.Acts'; 311.

The printed record does not show that any further action was taken by the Assembly unless it was the Synod's inquiries which led to the recommendation concerning penny bridals made in 1706.

Presbyteries were recommended by the General Assembly

"to apply to the judges ordinary, for putting the laws relating to penny bridals in execution, and appoints their Commission, upon representations from Presbyteries of the judges their refusal, to apply to the Government for obliging them to execute their office in this matter". 1 This act does not appear to have had a lasting effect as the Assembly made a similar recommendation in 1719 which also implied that the lower church courts were as negligent as the civil magistrates.

The Assembly advised

"Synods, Presbyteries, and Kirk-sessions, to see to the execution of the Acts of the General Assembly against abuses at penny weddings, and to apply to the civil magistrate for the execution of the laws against persons guilty of abuses and disorders on these occasions." 2 Some church courts, however, were punishing offenders. For instance, nine such offences were recorded at the meeting of the Presbytery of Duns in January 1721. 3 The recommendation does show that the Church expected the support of the civil magistrate in its action against penny bridals as had the Kirk Session of Stirling a hundred years before.

#### 4.7.3. Summary and implications.

Attempts to regulate bridals appear to be the result of initiative and innovation at the local level by kirk sessions, presbyteries and burgh councils. Parliamentary legislation is represented mainly by the Act of 1681 against the exorbitant expence of baptisms, marriages

1. 'G.A.Acts'; 395.
2. 'G.A.Acts'; 531.
3. Graham. 'Ecc.Disc.'; 137.

and funerals, and its main provision - a restriction on numbers - had local precedents. Bridals were also included in legislation on price fixing by Justices of the Peace and in laws against luxury. The General Assembly passed only two acts, one in 1645 and another in 1701 which revived the latter. The 1645 act left specific enactment to the discretion of the presbyteries. Action against bridals was not usually initiated at the national level.

The local legislation had two main characteristics. The first is the co-operation between the kirk sessions and civil magistrates. At Stirling, for instance, both the session and burgh council required the other on different occasions to pass acts to conform with their own. The power of Justices of the Peace to fix the lawin, which was reserved to them by the Privy Council in 1612, must have been of particular interest to kirk sessions. The second is that the acts were often concerned with restraining the cost of bridals and sometimes with restricting the number of guests. Both, with other various provisions, were intended to curb the abuses which were thought to occur frequently at marriage celebrations. These included drunken<sup>n</sup>ness, profanity, bawdiness and high spirits. The Presbyteries of Haddington and Dunbar, for instance, regarded penny weddings as seminaries of all profanation within their bounds.

These acts anent bridals reveal the marriage festivities as a counterpoint to the solemnities of the celebration before the congregation. The formality in church is balanced by the dancing and bawdiness of the reception. The festivities complement some of the preceding sections of this chapter such as the regulations concerning the time and place of marriages, and the proclamation of banns. Both the service in church and the celebrations emphasised that the change



in marital status was of public concern. Some of the celebrations were, indeed, held in the streets. The taking of a lawin ensured that festivities would be held even where the couple <sup>could</sup> not finance the celebrations themselves, for instance if they were servants. The Church was not opposed to these celebrations - they tried to ensure that they were sombre and decent. The festivities provided an informal occasion for the two families to meet each other as individuals. There was the opportunity for personal inter-action to reinforce the nominal kinship relations created by the marriage. The Act of Parliament of 1681 recognised this by including some kin in the clause restricting the number of guests.

The combined efforts of the Church and State failed to restrain penny bridals, thus showing that there were limitations on their ability to alter social customs. In some areas this may have been because conflicting economic interest influenced the people responsible for enforcing the laws. In Inverurie and the Garioch, for instance, the lairds bound their tenants to hold all their marriages at an alehouse because this was the outlet for their bear (barley) crops in malt. <sup>1</sup> But the main reason was that the festivities reflected the social significance of marriage. It could be argued that the Church and State would only have succeeded if they had diminished the importance of marriage and kinship in society. This was great enough to be reflected in dress: Brereton made a note in his travel journal that

"The weomen here weare and use uppon festiveall dayes 6 or 7 severall habits, and fashions: some for destinction of widowes, wives and maides: others apparelled according to their owne humour and phantasie .... Young maides nott married, all are bareheaded". <sup>2</sup>

1. *Emmerson*. 'Social History'; 73.
2. *Brereton*. 'Journal'; II, 30 (1635)

All the major concerns of community life were represented in a marriage including among others, status, notions of personal worth, disposition of property and in some cases power. The marriage ceremonies not only helped the couple to reorientate themselves into their new roles but also brought together their relatives, friends and neighbours and helped them to adjust to the new roles and their implications for social relationships with people other than the couple. In relatively small and undifferentiated societies roles tended to be interdependent so that a role change affected many aspects of social behaviour and many other individuals within the community. It is not therefore suprising that attempts failed to restrict the number of guests and restrain the abuses at wedding festivities.

## 5. IRREGULAR MARRIAGES

Irregular marriages were not a novel phenomenon of the 16th and 17th centuries, and the Church of Scotland worked within a framework of ideas that had been developed since the fourth Lateran Council in 1215. Some of these have been discussed in an earlier section (3.3.3), for instance, the acts of the Synod and Diocese of Aberdeen in the 13th century and the acts of the General Provincial Council of 1552. The two most important concepts were the definition of an irregular marriage, and the question of its validity. According to Hay a clandestine marriage

"means a marriage which is not contracted according to the custom of the country nor before sufficient parents, friends or witnesses to testify to it".<sup>1</sup>

The customs in the post-Reformation context included regulations as to time of day, day of the week, proclamation of banns, parental consent and celebration before the congregation (see 4.1 to 4.4). The major difference after the Reformation was the abolition of prohibitive impediments, especially of consanguinity which was replaced by laws against incestuous marriages. Irregularity did not affect the validity of a marriage - there could be valid irregular marriages and invalid regular marriages. Hay explained in his 'Lectures' that

"Although persons capable of marrying commit sin by contracting a clandestine marriage, the marriage is valid ... For it is not of the essence of marriage to contract it in the presence of the Church and according to the custom of the country, but a matter of

<sup>1</sup> Hay. 'Lectures'; 29.

propriety. The fitness of the parties is of the essence of marriage."<sup>1</sup>  
 The material can be misinterpreted if these two principles are ignored.

Misinterpretation can also arise if certain distinctions are not made in regard to the legal proofs of marriage - promise of future marriage followed by consummation, cohabitation, and exchange of consent in words of the present time. These are the different combinations of evidence which would create a presumption of marriage in a court of law sufficient for the court to determine that a valid marriage existed or had existed. This would be relevant in some instances in suits for adherence, accusations of bigamy, claims for inheritance, etc. They are not forms of marriage in the same way as solemnisation of marriage. Forms of marriage apply to contemporary interpretation of events and legal proofs of marriage are included here as the need for them arose more from irregular than regular marriages. The method of celebrating a regular marriage was intended to provide sufficient witnesses to testify to the existence of the marriage in any subsequent law suits and thus avoid the need for a court to assume the existence of a marriage on the basis of presumptive evidence. It was likely to be more difficult or even impossible to find witnesses to testify to the exchange of consent of marriage in words of the present time for irregular marriages. This partly explains why clandestine marriage is often used as a synonym for irregular marriage.

<sup>1</sup> Hay. 'Lectures'; 31.

## 5.1 Legislation anent irregular marriage.

### 5.1.1 Precedents.

Legislation in the 17th century brought irregular marriage within the jurisdiction of civil courts. The Church of Scotland also developed further the regulations concerning banns and the solemnisation of marriage, and it was these that were supported by Acts of Parliament. There were, however, other precedents which formed the background to these acts - the General Assembly's attitude to Roman Catholic marriages and civil action against celebrators of irregular marriages.

There are several instances of the civil courts taking action in the 16th century although it is not exactly clear under which law they claimed jurisdiction. In 1587 William M'Clellan was warded on an accusation of abusing the sacraments and marriage. He was released on his own promise, under pain of death, to remain in Galloway and not to usurp the ministration of the sacraments "or making marriage or abusing the samin in any time heirafter within this cuntrey".<sup>1</sup>

The case of Sir James Ker, tried on indictment in 1590, is similar though there is the additional charge of being excommunicated for six years. The main charge is that he had continued "to abuse the sacraments, by marrying sundry persons, and baptising of children" after being deposed for misbehaviour from his office of clergyman in November 1583. It was submitted to the King's pleasure

<sup>1</sup> 'Burgh Recs. Edin.'; IV, 493.

"that the prisoner should stand two hours at the Cross with a paper in his hat denoting his crime, and that he should not commit the like transgression again under pain of death".<sup>1</sup>

In both these examples the offence is not in celebrating irregular marriages: this is simply evidence of the prisoner acting as if he were a clergyman. The same concern with people ministring marriage is also shown in the later Acts of Parliament. The Act of 1649 in particular ordered the celebrator of an irregular marriage to be banished under pain of death.

The issue of irregular marriages was raised in only three General Assemblies in the sixteenth century. The paucity of references is probably misleading as the subject was perhaps comprehended in discussions on the enforcement of banns and the disciplining of ministers. It is striking that on at least two occasions the Assembly's decision can be described as revolutionary. Two of the three questions appear to have been prompted primarily by irregular marriages solemnised by Roman Catholic priests.

The Assembly of 1579 was asked what order should be taken with persons married by Popish priests, without proclamation of banns:

"Sall they be esteemed as married and if not, quhat discipline salbe usit against them". The answer given was that "this conjunctioun is no marriage, and therfor ordaines the persones to be callit befor thair particular Assemblies and satisfie as fornicatours; and upon new proclamatioun to be married according to the ordour of the reformat Kirk; and the papist priest to be punischit".<sup>2</sup>

<sup>1</sup> Arnot. 'Celebrated Crim. Trials'; 337-338.

<sup>2</sup> 'B.U.K.': II, 441.

On first reading this can be taken to mean that popish marriages were null. The answer, however, does not use the words null or invalid, and it is plausible that the statement meant that popish marriages were illegal. The satisfaction 'as fornicators' need not imply that the marriage was invalid as fornication had a general meaning of illicit sexual intercourse. Consummation of an irregular marriage would be illegal until it had been regularised by a solemnisation according to the order of the Church of Scotland, or had been found valid by a court. The other interesting aspect is that the non-proclamation of banns was stressed as much as celebration by a priest. This begs the question which was more important: the banns or the popish priest. What is clear is that the Assembly decided that it was illegal for a <sup>i</sup> priest to celebrate marriage, and hence that only ministers of the Church of Scotland could lawfully solemnise marriage.

Two years later the Synod of Lothian referred several suggestions to the General Assembly, including

"That ane article be suited be the Generall Assemblie at the Parliament, that all marriages without consent of parents, proclamatiouns of bands, or utherwayes without the awin solemnities according to the ordour of the Kirk, be decernit null". The Assembly ordained that

"this article to be cravit at the Parliament, beand first well qualified and presented to the Kirk".<sup>1</sup>

The question does not mention popish marriages and it is possible that confirmation was sought that the 1579 decision applied to all

<sup>1</sup> 'B.U.K.'; II, 535-538.

irregular marriages, or to seek a declaration that illegal marriages were invalid. Its referral to a committee may be because of a lack of unanimity within the Assembly, or a tactical move to suppress the motion in the face of strong support for the suggestion. The phrase 'well qualified' and its referral back to the Assembly certainly suggests that there were differences of opinion. There is no record of further discussions in the Assembly, or of a petition being presented to Parliament. The answer does recognise that the definition of a valid marriage belonged to the jurisdiction of the civil courts and could not be altered by the Assembly on its own.

That no further action was taken in 1581 is implied by the reappearance of this question in the General Assembly of 1595:

"As concerning marriages made be excommunicat Priests, or others that hes served in the Kirk, and deposit from thair office, or be privat persons: The Assemblie declares such mariages to be null; ordaining the brethren of Edenburgh to travell with the Commissars of Edenburgh, that they decid according to the saids conclusions".<sup>1</sup> The motion is restricted to the status of the celebrator of the marriage and not the proclamation of banns, parental consent or other regulations. The Assembly is much more positive than in 1581 which suggests that there was greater unanimity within the Assembly over the invalidity of irregular marriages. The proposed action is, however, more cautious - the Commissars are to be persuaded. The Church again recognises that the decision lies with others, in this case with the court that dealt with disputes involving the

<sup>1</sup> 'B.U.K.'; III, 855.



validity of marriages. The Commissary records are not published and it is not known if an approach was made.

These examples show that the civil courts in the 16th century took action against people who solemnised marriage and were not ministers of the Church of Scotland. This focus in irregular marriages is reflected in the questions before the General Assemblies of 1579 and 1595. The question of 1581 in contrast concentrates on irregular marriage as marriages which avoided the regulations regarding banns. The former is an issue of status, the latter of procedure. The most important point is that there were members of the General Assemblies of 1581 and 1595 who believed that illegal marriages should be declared null. The civil law as applied by the Commissary Courts was less extreme and followed more closely the precepts of Roman Law and pre-Reformation Canon Law. Their principle was that the free consent of both parties was the essence of marriage.

#### 5.1.2 The legislation of the 1640's.

There are no subsequent references to irregular marriage in the General Assembly before it ceased meeting in 1619. It was only a year after its revival in 1639,<sup>that</sup> the General Assembly considered irregular marriages. The evidence is from the records of Parliament and not the printed records of the Assembly. The Assembly presented a supplication to Parliament craving "ane civill sanctione for prohibitione of mariage in England to all Scottis people indwellars in Scotland". The fines suggested were 20 marks for a yeoman's servant, £40 for a yeoman master, and a sixth part of yearly rents for

all others. The fines were to be paid to the offender's kirk session for the use of the poor. The supplication was "revoked and past in articles".<sup>1</sup>

It is odd that the Assembly applied for civil sanctions against only one type of irregular marriage and not a more general Act against all clandestine marriages. Marrying across the border was only one way of evading church discipline. The validity of such marriages is not raised. The proposed Act does not appear to have progressed any further, suggesting that Parliament did not share the same attitude as the General Assembly.

This approach was followed by another two years later which met with more success. This again only appears in the records of Parliament. The Assembly humbly petitioned Parliament that they

"would be pleased to appoint some good course quherby mariages maid out of the kingdome or by deprived Ministers or seminarie priestis and mariages maid without the consent of parentes or these who ar sub tutela parentum may be restrainit".<sup>2</sup>

The proposals of 1639 were extended to include dissenting ministers and marriages without parental consent. It is perhaps surprising that the opportunity was not taken to include marriages without proclamation of banns. Possibly the Assembly felt that this was covered adequately by their acts, or was more proper to the Church.

The petition was presented on the 20 August and on the 1 September Parliament passed an Act forbidding unlawfull marriages. Its content was not as wide as the title suggests as it is restricted to marriages outside Scotland as requested by the Assembly in their

1 'A.P.S'; V, 596.

2 'A.P.S.'; V, 645.

previous supplication of 1639. Parliament was still out-of-step with the Assembly. The preamble justifies the Act as a remedy for "the great abuse and dangerous evill" which had followed from Scots "Goeing to the neighbour Kingdomes for geting themselves married there Which they could not obteene in this kingdome by the lawes and constitutiones therof".

The Act forbad men and women ordinarily resident in Scotland to marry in England or Ireland without banns being proclaimed in Scotland and against the laws of Scotland. The fines were graduated according to rank between a 100 marks for a person of inferior quality to £1,000 for a nobleman. Stocks and irons were to be used as punishment for <sup>an</sup> offender too poor to pay. These penalties are more severe than those suggested by the Assembly in 1639. The money was to be divided equally between the king and the kirk session, and not all to the poor as suggested two years before. In a sense Parliament was being generous as traditionally the proceeds of justice belonged to the Crown. Both the king's and Church's advocate were ordained to persue cases before the Civil Judge. The Act specifically stated that the civil sanctions were in addition to any action by the Church courts - "Which paines corporall or pecuniall shall nowayes be prejudiciall or derogat from the order and censures of the kirke".<sup>1</sup>

This Act was really an answer to the supplication of 1639 and not the petition of 1641. It was limited to persons evading discipline by marrying outside Scotland and did not include irregular marriages within Scotland or action against the person

1 'A.P.S.'; V, 348.

who 'solemnised' the marriage. The penalties, however, were much more severe.

The legality of marriages solemnised by Catholic priests was an issue that was raised on two occasions in 1646 in the Commission of the General Assembly. The first question of 20 August came from the Synod of Moray, and the second similar question from Mr. John Armand, minister of Inverness, on 30 December. That it was asked twice suggests that the initial answer by the Commission was disputed, possibly by the Presbytery of Inverness. On both occasions the Commission's answer was basically the same. The second reply was—

"anent these who pretend to have been married by priests, both parties married should mak publik satisfaction for that unorderly marriage, and be proceeded against in case of their disobedience with the censurs of the Kirk".<sup>1</sup>

This follows the decision of the Assembly in 1579. It is unfortunate that the exact dispute is not revealed: perhaps the Presbytery of Inverness was arguing that Catholic marriages were either lawful or null. The Synod's records in the Scottish Record Office may give a clue.

The kind of Act that the General Assembly envisaged in 1641 was passed in 1649 after further representations from the Assembly. The petition is not printed in either the Parliament or Assembly records. A notice, however, in the Commissions of the General Assemblies' records for 14th March 1649 that the Clerk reported on

<sup>1</sup> 'G.A.Commissions'; I, 38, 171–172.

the overtures and desires made to Parliament for Acts anent fornication, and clandestine marriages and that these "wer all past in Parliament".<sup>1</sup>

The Act against fornication had been passed on 1 February, and that against clandestine marriages on 13 February.

It was necessary, according to the preamble of the Act, that all marriages were celebrated according to the "Laudable ordour and constitution of this kirk" and by persons authorised by the Church. Several reasons and forms of irregular marriage were specifically mentioned:

"Sundrie either out of Disaffection to the religioun presentlie profest in this kingdome Or be desirous to eschew the censures of this kirk Or to falsifie their promise of mariage formerlie made to others Or to decline the Concurrence and consent of their parents or others having interest Or out of some other unlawfull pretext Doe procure thameselffis to be married and are married either in a clandestine way contrarie to the established ordour of the kirk Or by Jesuits preists Deposed or suspended ministers or any other not authorised be this kirk."

These can be arranged into two main types. Firstly, irregular marriages where the main reason was to avoid the proclamation of banns, thus evading the requirement of parental consent or to avoid the performance of a pre-existing marriage contract. Secondly, where an irregular marriage arose out of non-conformity, either Catholic or Protestant. This is the first occasion in the records which were used that Protestant non-conformity is included as a

<sup>1</sup> 'G.A.Commissions'; II, 240-241.

cause of irregular marriages.

The Act ordained punishments for people who married in a disorderly way or by persons not authorised by the Church. The Act of 1641 against persons who married outside Scotland was ratified and its offenders subjected to the new penalties. These were much more severe. All guilty persons were to be imprisoned for three months, and were to remain in prison until the fines were paid. The scale of fines was higher than those of 1641 as the comparison below shows.

Table 3. Fines for irregular marriage.<sup>1</sup>

	<u>1641</u>	<u>1649</u>
Nobleman	L1,000	L5,000
Baron and landed gentleman	1,000mks	5,000mks
Gentleman and burgess	L500	L1,000
Substantial persons	500mks)	500mks
Yeoman	L100 }	
Inferior persons	100mks)	

The increase was particularly marked for the higher and lower social ranks. Harsher punishments were reserved for the celebrator of the marriage, suggesting that the Act was particularly aimed at non-conforming ministers and priests. Celebrators were to be banished never to return under pain of death. It is possible that banishment was already used in practice and that this Act only placed the penalty on a legislative basis. These penalties were not to prejudice the Church's own censures against offenders, a proviso also made in the Act of 1641. To ensure enforcement the

<sup>1</sup> 'A.P.S.'; VI, pt II, 184.

procurator of the kirk was ordained to persue the application of the Act and its penalties before the civil judge.

This Act shares certain characteristics with the Act of 16 March 1649 against incest. Both appear to be an attempt at comprehensive legislation, codifying and adding to existing law to place it on a permanent basis. The second is that Parliament appears to be more in sympathy with <sup>the</sup> Church than on previous occasions. This would seem to imply a change in the composition of Parliament, in particular the emergence to a leading position of people more closely allied to the group who shared a similar influential position in the General Assembly. For instance, all the fines for irregular marriage were to be used for pious uses in the appropriate parishes unlike the Act of 1641 where the money was split equally between the Church and State. One way in which this Act differed from that against incest was that it was applied during the English administration of Scotland.<sup>1</sup>

### 5.1.3 Legislation 1661 to 1711.

The Acts of 1641 and 1649 against irregular marriage were rescinded with the rest of the legislation of that period at the Restoration. But they were far from forgotten. Almost as soon as it was possible, Parliament passed an 'Act against clandestine unlawfull' marriages. This Act of 1661 plagiarises large sections of the two previous Acts to the extent that only 5 lines out of a total of 62 (as printed in the 'Acts of the Parliament of Scotland')

<sup>1</sup> Nicoll. 'Diary'; 181. Proclamation of the Council 1656.

are new. All except the preamble of 10 lines is incorporated from the 1641 Act, and the first two-thirds (mainly the ratification of the 1641 Act) of the 1649 Act. There are minor insertions and changes in wording but these make no substantial changes. The minimal nature of the alterations can be illustrated by the major textural deviation of the 1661 Act. The Act of 1649 included the clause:

"And ordaines the procurator for the kirk to pursue before the Civill Judge the fulfilling of this act and ordinance for the corporall and pecuniall paines abovementioned".

This was rewritten in the 1661 Act as

"And ordaines his Majesties Advocat and the Procurator of the kirk to persue before the Civile Judge the parties contraveeners of this act or either parte therof for payment of the penalties respective abovementioned".

The major exception to this generalisation is that the penalties of 1649 were reduced to the level of those of 1641 for both irregular marriages and for marrying outside of Scotland. For instance, the fine for a nobleman was reduced from £5,000 to £1,000.

The running together of these two Acts did produce some differences in penalties between the two categories of offences which were not present in the Act of 1649. Some of these were probably intentional. People who married outside of Scotland were not liable to the three months imprisonment and further imprisonment until the fines were paid for people who married irregularly within Scotland. The latter offenders if too poor to pay the fines were liable to indefinite imprisonment while those marrying outside



of Scotland were to suffer corporal punishment. There are some anomalies, however, which suggests that the Act was passed in a hurry. The two categories, for instance, of substantial persons and yeomen was not included in the scale of fines for an irregular marriage within Scotland. The division of fines was also different: those for offences within Scotland went to the local kirks for pious uses, whilst those for offences without Scotland were divided equally between the King and the local kirks.<sup>1</sup>

The character of this Act of 1661 suggests an urgent need to replace the Acts of 1641 and 1649. There must have been an important reason why there was felt to be a need for civil sanctions against irregular marriages. This may have been because of legal problems which could arise from disputed marriages. Alternatively the motivation may have been 'political'. The Act may have been intended to demonstrate support for the Church of Scotland, or as a means to ensure conformity to the Episcopalian order. One of the penalties retained was the banishment under pain of death of the celebrator of irregular marriages; and the Act specifically mentioned 'deposed or suspended Ministers'.

The king's share of the fines for irregular marriages outside Scotland was sometimes granted to private individuals. A petition to the Privy Council from Captain Robert Rind in 1671 shows that the enforcement of the penalties was on occasions difficult, and that in one instance the King's Advocate did pursue offenders before the civil judge as laid down in the Act of Parliament. It is

<sup>1</sup> 'A.P.S.'; VII, 231.

apparent that the Captain had difficulty in obtaining the Church's co-operation as the Privy Council had to recommend

"to the moderatours of the respective presbyteries and ministers in their paroches and clerks of kirk sessions to give information of all such persons within or belonging to their bounds" who had transgressed the Act against irregular marriages. Even so, it required the suit by the King's Advocate to obtain judgement against named offenders in favour of Captain Rind.<sup>1</sup>

That the curbing of irregular marriages was associated with the suppression of non-conformity is shown by further legislation in 1672. It is significant that the additional penalties were enacted as part of an Act against unlawful ordinations. The Act declared that

"whosoever shall be married within this Kingdome by the forsaid persons (unlawfully ordained ministers), or by any other persone not lawfullie authorized That they shall amit and lose any right or interest they may have by that mariage, jure Mariti vel jure Relictae".

This was in addition to the penalties provided by the Act of 1661, which was ratified and renewed.<sup>2</sup> The Act clearly shifts the emphasis in irregular marriages to dissenters, and was intended to discourage non-conformists establishing a Church in competition with the established Episcopal Church. The celebration of marriage was important as it emphasised the solidarity of the dissenting congregation and continuity in membership. There was a difference between

1 'R.P.C.'; III<sup>3</sup>, 351, 386-388.

2 'A.P.S.': VIII, 71.

itinerant preachers and a Church ordaining its own ministers and joining together in witnessing changes in social status. The loss of property rights was potentially a very severe penalty, and reflects the importance of property in marriage. The idea was probably to remove any advantages that might accrue from an irregular marriage. Certainly many of the cases of 'rapt' seem to revolve around the acquisition of property, or at least the pecuniary motives attributed to the 'abductor'. It is difficult to believe that such a severe penalty was regularly enforced and was meant to be more than a threat implemented rarely.<sup>1</sup>

The laws against irregular marriage remained unaltered until after the expulsion of the Stuart dynasty and the abolition of bishops. One of the first Acts after the re-establishment of Presbyterianism was the rescission of the laws of conformity. This Act of 1690 included a clause repealing

"all other Acts clauses and provisions in Acts whatsoever made since the yeare 1661 Inclusive against Nonconformity or for Conformity to the Church and government thereof as then established under Archbishops and Bishops"

The Acts of 1661 and 1672 anent irregular marriage were not named, although the Act of 1670 against disorderly baptisms was specifically repealed.<sup>2</sup> The Act may have been interpreted as repealing that of 1672 (unless this was achieved by the Act of Toleration). This was certainly the case by 1715 when Stewart in resolving one of Dirleton's doubts about the Act of 1672 concluded his answer by stating, "But it is no matter, for the Act is rescinded".<sup>3</sup>

1 See MacKenzie: 'Observations', 397-399.

2 'A.P.S.'; IX, 198. See also: 'R.P.C.'; XIII<sup>3</sup>, 157, 227-230.

3 Stewart. 'Dirleton's Doubts Resolved'; 176.

This supports the interpretation of this Act as principally being against dissenters rather than irregular marriages. The Act of 1661 was not repealed.

There appears to have been a refocusing of interest on irregular marriages as a problem of Church discipline, perhaps because the new leaders naively believed that there would not be any substantial dissent from the new order. Certainly the first law passed by either Parliament or the General Assembly dealt with the enforcement of discipline. In 1690 the Assembly discharged the celebration of marriages

"without due proclamation of bans, according to order, three several Sabbaths in the respective parishes."<sup>1</sup>

It was not long before laws against irregular marriage were once again largely a question of conformity to the system of Church government. The preamble of the Act of 1695 against irregular baptisms and marriages, after considering that these ceremonies had always been done by ministers of the Established Church, focused attention on dissenters by declaring that

"several Ministers now outed of their Churches do presume to baptize children, and Solemnize marriage, without proclamation of banns, or consent of Parents, and sometimes within the forbidden degrees."

The Act forbade outed ministers from baptising or solemnising marriage under pain of imprisonment until they found caution to go into permanent exile. Exile was already one of the penalties under the Act of 1661 for celebrating irregular marriages. This

<sup>1</sup> 'G.A.Acts'; 226.

was without prejudice to the existing Acts against private and clandestine marriages which were declared "to stand in full force" - the plural suggests that the Act of 1672 had not after all been rescinded in 1690.<sup>1</sup>

A further Act was passed by Parliament in 1698 to make more effectual the Acts of 1661 and 1695. This originated as an overture, though regretfully the printed record does not confirm that it came from the General Assembly. The Act was brought in from the Committee for Security and amended at the second reading.<sup>2</sup>

The Act created two new offences, and laid additional penalties on the celebrator of the irregular marriage. The main aim was to identify and punish the celebrator and witnesses to the marriage. The first new offence was of being a witness to a clandestine marriage, which was to be punished by a fine of £100 for each occasion. Those too poor to pay were to be subject to such corporal punishment as decided by the Privy Council. All the money was to be applied to pious uses. The other new offence was intended to assist in finding the identity of the witnesses and celebrator. The couple who were married were to declare

"when required the names and designations of the Minister and such as were Witnesses to the said Marriages".

The fines for refusal were:

nobleman	£2,000
baron and landed gentleman	2,000merks
gentleman and burgess	£1,000
other persons	200merks

1 'A.P.S.'; IX, 387

2 'A.P.S.'; X, 133, 144, 146, 148.

The money was to be used for pious purposes in the respective parishes. These fines were modelled on those of 1661 for marrying irregularly, but are double. Offenders were also to be imprisoned until they had paid the fine and identified the witnesses and celebrator. The celebrator was liable, in addition to the penalties of 1661 and 1695, to be summarily seized by any magistrate or Justice of the Peace and to be punished by any pecunial or corporal penalties the Privy Council thought fit. These wide-sweeping powers meant that the Privy Council could inflict any penalty, including death, on the celebrator.

This Act of 1698 marks the culmination of the process that began in 1641. The inclusion of penalties against witnesses meant that all participants in an irregular marriage were liable to civil sanctions. Perhaps the most surprising aspect is that it took so long for witnesses to be punished - they were accomplices to a ceremony which had been a civil offence since 1649.

#### 5.1.4. The Act of Toleration.

The Act of Toleration of 1711 marked a great change in principle by legally recognising the ideal of one state, one church was politically impractical. Two were recognised, the Church of Scotland (with state support) and the Episcopal Church of Scotland. The alternation between Presbyterian and Episcopal ended in a compromise enforced by politics. The question of marriage was specifically included in the Act. It was declared free and lawful for Episcopalian Ministers to solemnise marriage "without incurring any Pain or Penalty whatsoever Any Law or Statute to the contrary

notwithstanding". The legislation which was repealed and annulled was described as being passed in Parliament specifically against the Episcopalian clergy.<sup>1</sup>

The effect of this on the Acts against irregular marriage was less than might be supposed. Only the Act of 1695 appears to have been repealed (and the Act of 1672 if it had not been repealed in 1690). The Acts of 1661 and 1698 remained substantially the same until the Marriage Notice (Scotland) Act of 1878. On occasions the Acts were enforced in all their rigour. In 1755, for instance, a nonjuring Episcopalian clergyman was condemned to perpetual banishment under pain of death for celebrating a marriage without legal authority. The defence unsuccessfully pleaded that the Act of 1661 had been repealed with all other laws against nonconformity in 1690.<sup>2</sup>

An act of the Burgh Council of Stirling further illustrates that strong feelings against irregular marriages persisted after the Act of Toleration. This act of 1716 described clandestine marriages "as crimes of the most dangerous consequence", and embodied the sections of the Acts of 1661 and 1698 against the couple, celebrator, witnesses, and refusal to name the latter. Recognition of Episcopalians does not appear to have decreased the number of irregular marriages:

"Yet, notwithstanding of these excellent laws, by reason of the not punctual and exact execution thereof the foresaid heinous offence has greatly increased and being frequently practised, and nowhere elsemore than in this place, to the great dishonour of

1 'Stats. of the Realm'; 558.

2 Arnot. 'Celebrated Crim. Trials'; 339-343.

God, scandle of our holy religion, and discredit of the place, seing by such marriages the crying sin of bigamy much overspreads by severalls that stand married to others at the same time, there being in that disorderly way married to other wives, as is of late too well knowen in the place, which if not speedily prevented by the punctual execution of the foresaids laws will undoubtedly draw down the wrath and displeasure of a holy God upon the congregation where such wickedness so much abound."

The Acts were ordered to be rigorously applied against all offenders without favour. The vigour of the prose is in the uncompromising tradition of the 1640's, and vents itself against irregular marriages as leading to immorality.<sup>1</sup>

#### 5.1.5. Summary.

In the sixteenth century irregular marriage does not appear to have been a civil offence, although the celebrator was liable to civil punishment as an abuser of the sacraments. The Church punished offenders under its own laws, for instance, for the non-proclamation of banns. The General Assembly only recognised the interest of Parliament or the Commissary Courts where the question was the validity of irregular marriages. The Acts of 1641 and 1649 therefore represent a reordering of responsibilities between Church and State whereby civil sanctions were used to support the 'order and constitution' of the Church. This was initiated by the Assembly in 1639 when it petitioned for civil punishment of irregular marriages outside of Scotland. This co-operation was

<sup>1</sup> 'Burgh Recs. Stirling'; II, 144.



maintained after the Restoration by the re-enactment of the Acts of 1641 and 1649. Subsequent legislation concerned itself particularly with the punishment of the celebrator, and the Acts against irregular marriage were used to punish non-conformity. This applied to Episcopal or Presbyterian periods, and after the Act of Toleration when both forms were recognised by Act of Parliament.

It is not surprising that the legislation has two main foci, the enforcement of Church discipline and the suppression of non-conformity. The balance between the two varies, depending on the perception of problems at the time a particular Act was passed. This is particularly marked by the act of Council of 1656 (see below) which concentrates on discipline as non-conformity was not perceived as a problem. Irregular marriages without parental consent were another focus included in the enforcement of Church discipline.

The emphasis on discipline accounts for the mention in several of the preambles of the Acts to the non-proclamation of banns. There was a fear that irregular marriages would undermine the whole structure of discipline. This is shown in the grievances addressed to Queen Anne by the General Assembly in 1703 when it was said that the gross abuses of the Episcopal clergy, particularly irregular marriages and baptisms, tended

"to the weakening and frustrating (of) the good ends of discipline, the encrease of licentiousness and irreligion".<sup>1</sup>

The kind of abuses that could arise from irregular marriages can be illustrated by several examples. Patrick Heriot and Elizabeth Seton

1 'G.A.Acts'; 321.

were married in England in 1622 and thus avoided (temporarily) making satisfaction for fornication before getting married.<sup>1</sup>

Nicoll mentions Mr. Alexander Cornwell, a deposed minister,

"quha did mary pepill privilie, sum of the wemen haiffing husbandis on liff, and sum of these men haiffing ane or twa wiffes".<sup>2</sup>

Perhaps closer to the interests of the members of Parliament and some of the members of the General Assembly was the fear that irregular marriages would lead to marriages without parental consent. This aspect was emphasised in the act of Council of 1656 which warned that the penal laws would be put in speedy and effectual execution against people who married clandestinely and without consent of parents. The preamble states that the church<sup>s</sup> of Edinburgh and others had complained of marriages without parental consent to the Council and that

"the hartis of mony parentis and utheris as aforesaid (tutors), (had been) deiply wounded quhilest thai behold thair childrene and relatiounes, not onlie neglect thair dewtie, bot cast thame-selffis by such disorderlie courses, into wofull snares and misereis, out of thequhich they cannot extricate thameselffis".<sup>3</sup>

The assertion that relations also neglected their duty to the parents supports the suggestion that marriages without parental consent were sometimes the result of disputes within the kinship group (see 4.4). It is also noticeable that Sir George MacKenzie's discussion of the Acts of 1661 and 1672 concentrates on queries relating to parental consent. For instance, in his first observation he argues that the Acts were applied only to the marriages

1 'Synod of Fife'; 96.

2 Nicoll. 'Diary'; 94 (1652). See also Fraser, 'Husband and Wife'; I, 236, fn. a.

3 Nicoll. 'Diary'; 181.

of minors without parental consent and not to all irregular marriages without the consent of parents.<sup>1</sup>

The severe punishment of the celebrator is characteristic of the Acts, and non-conformity is mentioned in all the Acts except that of 1639 against irregular marriages without Scotland. By 1698 the celebrator was liable to summary seizure, confiscation of goods, exile under pain of death, or any other punishment thought fit by the Privy Council. These penalties remained in use after the Act of Toleration and were abrogated only for a short period after the Restoration and the re-establishment of Presbyterianism. Instructions by the Council and Parliament make it clear that the legislation was part of the laws against dissenting ministers and their followers. For instance, the Privy Council published a proclamation in 1676 announcing further measures to be taken for the suppression of conventicles. One clause called for the execution of the Acts of 1661 and 1672 against irregular marriage, and the payment of a reward from the fine to encourage informers.<sup>2</sup> Similarly, in 1685 a commission was granted to Justices of the Peace

"to put the laws in Execution against all who shall be guiltie of Conventicles irregular Baptisms and marriages Withdrawing from Church ordinances and other such Disorders in so farr as they are not capital".<sup>3</sup>

The suggestion has been made that there existed a more traditional form of marriage than solemnisation in Church where the couple married themselves in front of witnesses without a

1 MacKenzie. 'Observations'; 397-399.

2 'R.P.C.'; IV<sup>3</sup>, 548.

3 'A.P.S.'; VIII, 472.

person leading the ceremony. The Acts against irregular marriage were allegedly intended to suppress this popular culture which pre-dates the Church service. This is not supported by the evidence on irregular marriages which has been examined. Rather the opposite is suggested: Church marriage, which remained unaltered in its basic elements for hundreds of years, had so permeated society that even when people deviated from the normal procedures the irregular marriage was modelled on the Church service. An illustration of this is provided by the irregular marriage of James Somervale and Elizabeth Grahame in 1671. The complaint of the King's Advocate before the Privy Council is fairly typical in expounding the obligations of children to parents. Elizabeth was at dancing and other schools, and James had taken advantage of this to propose marriage "without either communicating or desiring her to communicat and import his desire to her parents". His motives were said to be financial as she was sole heir to a reputed "great and opulent fortoun". The complaint is unusual in the details it gives of the ceremony:

"(James) Somervale and his complices did induce her to goe to a house in the Cannongait, a little beneath the Cannongait croce, and there, upon the second of June instant, certain persones being brought of purpose to be withnesses, Patrick Wilson, ane nottar, who never had bein in orders and had not power to mary any person, being conduced and hired to that purpose in a most scandalous maner and to the great affront and contempt of the lawes of the kingdome, presume and take upon him to celebrat a pretended and mock mariage betwixt the said (James) Somervale and

Elizabeth Grahame, and did pray befor and after and used the ordinar words useall at mariage, and caused the said (James) Somervale and Elizabeth Grahame joine hands, and personating ane minister at imitating him and acting the solemnities that are in use in celebrating of mariage, the said Patrick did in presence of Robert Pape and others, witnesses, declair them to be married persones; and feiring that the said Elizabeth might theafter repent and consider her error, the said Patrick did of purpose conjure her upon her greatoath that she should not quit her pretended husband."

The couple were taken to Leith and bedded in front of Patrick Wilson and the witnesses, and they

"did stay all night and went to bed as married folks, palliating their bedding and conversing together in fornication upon pretence of the said unlawfull and pretended mariage".

The Privy Council punished the offenders with all the rigour of the Act of 1661, except Robert Pape who was out of the country. The couple were imprisoned for 3 months and only released after paying a fine of £500, and promising to satisfy the Church for the scandal. Patrick Wilson was banished to the plantations in America under pain of death.<sup>1</sup> In this case the irregular marriage is performed by someone playing the role of the minister, and mimicks a regular marriage. The Acts against irregular marriage also assume that these marriages are led by someone, and reserves the most severe penalties for the celebrators. These were either people who had been ministers or who had a reputation for celebrating marriages.

1 'R.P.C.'; III<sup>3</sup>, 335, 341-343, 348, 375-376, 696.

There is no hint of a separate cultural tradition as the deviance parodies what is normal. Other sources, however, may reveal that this generalisation has to be qualified, especially for tinkers and perhaps to include the sale and purchase of wives at markets.

## 5.2 Legal proofs of marriage.

The procedures for a legal marriage should have ensured that there were witnesses to the marriage and that it was lawfully contracted. The public performance of the ceremony was intended to make the work of both civil and religious courts easier in cases involving the obligations incurred on marriage. In irregular marriages it could not be assumed that the couple were lawfully capable of contracting marriage. There was also the problem of proving that the irregular marriage had taken place, especially where it had been clandestine.

Both the religious and civil courts dealt with cases where the marital status was important. Both dealt with sexual offences - fornication, adultery and incest. The Commissary Courts dealt with cases involving adherence, bastardy, inheritance, etc. The irregularity of a marriage did not affect its validity as the law recognised that the essence of marriage was the exchange of mutual consent. This applied to both civil and canon law and was not altered by the Reformation, which can be illustrated by comparing the quotation from William Hay's 'Lectures' at the beginning of this chapter with the following statement by Viscount Stair in his 'Institutions of the Law of Scotland':

"The publick Solemnity is a Matter, justly introduced by

positive Law, for the Certainty of so important a Contract but not essential to Marriage: thence arises only the Distinction of publick and solemn, private or clandestine Marriages, and tho' the Contraveeners may be justly punished ... yet the Marriage cannot be declared void, and annulled."<sup>1</sup>

It follows that both an irregular or regular marriage could be void if it was unlawful. Lawfulness in this context referred to the absence of any impediments:

"lawful Marriage is not opposed to Clandestine, or irregular Marriage, as not being after Proclamation in the Church, or by a person (not) having power to Marry by the Canons of the Church or Statutes of the Countrey: But that is only understood, as unlawful Marriage in this case, which materially is unjust and inconsistent, where Marriage could not have subsisted, albeit it had been orderly performed, as being by persons in degrees prohibited by Divine Law, or where either party had another lawful Spous then living, and undivorced."<sup>2</sup>

#### 5.2.1 Types of proof.

The courts required for proof of the existence of a marriage evidence of an exchange of mutual consent in words of the present time ('de praesenti') or evidence which implied the past exchange of mutual consent or the existence of a marriage. The method of proof is normally divided into three types: 'sponsalia de praesenti', 'sponsalida de futuro et subsequente copula', and cohabitation as man and wife.

1 Stair. 'Institutes'; 25.

2 Stair. 'Institutes'; 425.

'Sponsalia de praesenti', a promise of marriage made in words of the present time, comprehended regular as well as irregular marriages. It was direct and explicit evidence of a marriage. The Church's requirement of an adequate number of witnesses would probably have made this relatively easy to prove in cases where the disputed regular marriage was recent. Stair was cautious when it was to be used to prove the validity of less recent marriages where the couple's self-interest lay in acknowledging the marriage:

"Marriage may be proven by Witnesses, which is a direct and immediat Probation, but it seldom occurs, except in recent Marriages which have been Solemn. But in no case is it easie to be proven by Writ, although the Declarations or Testificats of the Person who Officiat, of the married Persons themselves, and even of the Witnesses, were produced: For these are but Testificats, unless the Oaths of the Witnesses be interposed, amongst whom he that Officiat, is a pregnant Witness, and others that were present, though not called nor required (ie. members of the congregation); Much less will the Oaths of both the married Persons prove the Marriage in all cases: For that may be by Collusion, to cover their Fornication, or to prejudge the lawful Succession by solemn Marriage."<sup>1</sup>

An example of its use in a case is provided by Robert Gray's suit of adherence against Marion Gray in 1709. The pursuer argued that they were lawfully married

"after the forme used and wont to be practised, of the pursuer's

<sup>1</sup> Stair. 'Institutes'; 712.



and defender's religion, being Quakers, in so far as that they, in the presence of famous witnesses, did engage themselves to one another in the holy bond of marriage, and joined hands together, and did subscribe ane declaration and forme of marriage".

Marion Gray had also judicially acknowledged the marriage before the Baron Court of Cumbernauld who had found them guilty of an irregular and clandestine marriage. There does seem to have been some doubt as to whether the engagement was a betrothal or marital consent 'de praesenti'. Unfortunately the Commissary Court did not make a judgement as the pursuer eventually let the suit go by default in favour of the defender.<sup>1</sup>

'Sponsalia de futuro et subsequente coupula' was proof of marriage by showing that a promise of marriage in the future had been followed by sexual intercourse. The intercourse was taken to imply consent 'de praesenti', and marriage was presumed. Stair affirms that

"Marriage is proven by the Sponsalia preceeding, as by the Contract of Marriage, whereby the Parties oblige themselves to Solemnize Marriage, and by Copulation following, or even by antecedent Promise of Marriage, whatever be the way that it is obtained or granted, if Copulation follow without Violence".<sup>2</sup>

The implied consent had sufficient force to override any conditions attached to the betrothal. Copulation negated any argument that the further promise had been extracted through the use of force and fear. This probably explains why in suits made before

<sup>1</sup> Fraser. 'Husband and Wife'; I, 266-267.

<sup>2</sup> Stair. 'Institutes'; 712.

the Privy Council dealing with irregular marriage (particularly those involving lack of parental consent) the 'husband' is accused of rape as well as abduction. The other impediment negated by copulation was non-age. The handing in of banns for proclamation was almost certainly interpreted as a contract of marriage, and the betrothal was sometimes made at the same time before the kirk-session. This is particularly important as the Church of Scotland did not usually keep registers of marriages - the register was traditionally for the proclamation of banns.<sup>1</sup>

There are several problems of interpretation associated with this proof and these are discussed below (5.2.2.).

The third and final kind of proof was cohabitation as husband and wife. This was the only form of proof that was explicitly recognised by statute law. An Act of Parliament was passed in 1503 which ordered that

"quhar the matrimonie was not accusit in their livetimis (,) that the womane askand his terce (,) beand repute and halding his lauchtfull wif in his livetime (,) sal be tercit and brouke hir terce without any Impediment or exceptione to be proponit against hir and quhill that it be clearly decernit and sentence gevin that Scho was not his lauchtfull (wife) and that scho suld not have ane lauchtfull terce therefor".<sup>2</sup>

After the Reformation cohabitation was used as a proof of marriage in cases of bastardy - the first occasion was possibly the case of Dury and Lumsden v. Cockburn in 1570 when the Commissaries decided that Cockburn was legitimate as his parents were "commonlie repute and haldin to have been mereit lang before the field of Flowden".<sup>3</sup>

1 'Statutes'; 142-143, no. 251. (1552).

2 'A.P.S.'; II, 243.

3 Riddell. 'Peerage Law'; 508.

By the time Craig was writing it was well established that the law presumed the legitimacy of a son

"from the long cohabitation on the part of his parents, without necessarily presuming that a marriage actually took place between them".

It was admitted as a proof because of the difficulty of proving a marriage long after its date.<sup>1</sup> Stair was more precise in describing the nature of the proof:

"Cohabitation and behaving as Man and Wife, for a considerable time, presumeth Marriage, though there be neither Contract, Promise nor Sponsalia preceeding, nor evidence of Copulation by Children ... These are presumptions so strong, that the Confession or Oath of either or both Parties will not Eleid the same, though they should acknowledge that they neither promised Marriage de futuro, nor contracted the same de praesenti; Yea though they should acknowledge that they so Cohabit to cover their Fornication, that they might be free to marry others when they pleased".<sup>2</sup>

Cohabitation was evidence which inferred the existence of a marriage. It was not necessary to show or assume that any form of promise or consent had been exchanged. The period of cohabitation required was not fixed. Stair avoids stating any period, although he cites one case of 1628 where it was ten years.<sup>3</sup> Eighty years earlier Craig had written that there is "much dispute as to what is a sufficient lapse of time" to prove cohabitation, and had concluded that there was

1 Craig. 'Jus Feudale'; 765-766.

2 Stair. 'Institutes'; 712.

3 Stair. 'Institutes'; 426.

"a difference according as the facts are old or recent: if the person whose status is in question was an old man, a relatively short period of cohabitation on the part of his parents would be sufficient; but if the date of his birth is less remote, I think a longer term of cohabitation would require to be proved."<sup>1</sup>

This implies that time was a secondary consideration. The most important part of the proof was the way in which the couple behaved towards each other, and the attitude of the community to their relationship. In particular whether the couple were held by common repute to be married. The corollary of this is that no matter how long a man and woman cohabited, it did not necessarily mean that the Commissary Courts would accept that they were married.

The kind of evidence required is illustrated by a case of bastardy in 1702. The Commissaries found

"it relevant and proven that the said Dorothea did cohabit with George Norris for many years at bed and board as his wife, and that they were generally held and reputed married persons, were taxed together, pursued before judicatories and sentenced as such, that their linnen and pewter were marked with their names, and that she signed bills by the name of Dorothea Norris".<sup>2</sup>

The case is fairly typical in that cohabitation is being used to prove the existence of a marriage 'celebrated' some years before the court case. Cohabitation was probably used particularly in cases involving disputed inheritance - *terce* as in the Act of 1503, or bastardy as above.

1 Craig. 'Jus Feudale'; 765-766.

2 Hermand. 'Consistorial Decisions', 83.

The three different kinds of proof are all founded on the premise that consent makes marriage. It did not matter whether the marriage was regular or irregular. Stair summarised the position in civil law by commenting that Marriage

"it self consists not in the Promise, but in the present Consent, whereby they accept each other as Husband and Wife; Whether that be by words expressly, or tacitly by marital Cohabitation, or Acknowledgement, or by natural Commixtion where there hath been a Promise or Espousals preceeding; for therein is presumed a conjugal Consent de praesenti".<sup>1</sup>

#### 5.2.2. Problems of interpretation.

The major problem of interpretation is the exact status of future promise and subsequent copulation ('sponsalia de futuro et subsequente copula') as a proof of marriage. The controversy dates from at least Lord Stowell's judgement in the case of Dalrymple versus Dalrymple in 1811 and was not settled in the courts until 1917 when the Second Division held in the case of Mackie versus Mackie that the promise of marriage followed by co\_pula constituted actual marriage. A major and influential contribution to the debate was made by Lord Fraser in his 'Treatise on Husband and Wife according to the Law of Scotland'. The issue was whether future promise and subsequent copulation itself made an actual marriage, or merely created an indissoluble pre-contract which required a decree of the Commissary Court ordaining solemnisation, or solemnisation in a church.<sup>2</sup>

<sup>1</sup> Stair. 'Institutes'; 25.

<sup>2</sup> Ireland. 'Husband and Wife'; 87, 88;  
Fraser. 'Husband and Wife'; I, 224.

According to Fraser, the pleadings and the decisions of the Courts prior to the publication of Stair's 'Institutes' in 1681 and for forty years afterwards assumed that promise plus intercourse was nothing more than a pre-contract. It could only be turned into a marriage by the voluntary act of the parties by solemnisation in church, or by a judicial decree obtained by the woman directing solemnisation. Until either of these had been done, promise plus intercourse did not give the rights of marriage enforceable at law. These rights included the legitimization of children, the civil rights of husband and wife to each other's property, and the presumption that the woman's children were those of her putative husband. This interpretation was changed once the practice began of raising an action of adherence instead of one to compel celebration as this assumed that an actual marriage existed. Solemnisation would be unnecessary if the marriage was already in existence.<sup>1</sup>

Fraser's interpretation relies heavily on evidence from the Church's courts and not from the Commissary Courts. This assumes that both recognised as relevant each other's rulings and were in agreement on the interpretation of promise plus intercourse. The assumption is probably correct as both relied on pre-Reformation canon law as the basis for their decisions. This discussion deals with the civil law cases which he cites. The Commissary Court records are unpublished and it has not been possible to refer to them for additional background and cases.

Fraser cites various suits to show that promise plus intercourse was nothing more than an indissoluble pre-contract to marry. In

<sup>1</sup> Fraser. 'Husband and Wife'; I, 327, 350-356.  
Ireland. 'Husband and Wife'; 88.

Canon Law a betrothal was dissol<sup>v</sup>able only by the consent of either party if intercourse had not taken place. Thus in a case heard before the Commissaries in 1568 the woman declared

"that there was na carnall daill betwixt hir and the said Johne, nor na uther thing that micht compel meriage betwixt thame, bot onlie ane contract quhilk tuke na effect and she was content of hir frie will to pass from the samin, and mak na farder instance thairintill".<sup>1</sup>

A betrothal was not dissoluble if intercourse had subsequently taken place. It had been sufficiently binding for a regular marriage to be annulled by the official of St. Andrews in 1552 on the grounds that the putative husband was not free to marry as he had previously promised marriage with another woman and had had intercourse with her.<sup>2</sup> In 1564 the Commissaries, on the basis of promise plus intercourse, ordered a couple to marry in church "and to complete the band". In the case of Adair vs. Dunbar of 1580 the Court decided that

"Albeit thair had bene sponsalia contractit per verba de futuro, yet thair wes nane of the saidis parteis culd haif bene compellit, neither to adheir nor zit to solemnizat marriage witout carnall copulation had followit thairefter".<sup>3</sup>

Fraser cites further cases of 1606, 1614, 1630 and 1646 where the Commissaries ordered the couple to solemnise marriage on the basis of betrothal followed by intercourse.<sup>4</sup> In an earlier case of 1575 the woman, Marion Creichton, had alleged that after handfasting in

1 Fraser. 'Husband and Wife'; I, 333. See also: I, 486.

2 Fraser. 'Husband and Wife'; I, 327.

3 Fraser. 'Husband and Wife'; I, 333, 487.

4 Fraser. 'Husband and Wife'; I 336.

front of witnesses, Alexander Thomsone

"had carnal daill companie and societie with the said Marion, using her as his spousit wife. Orthrow the same is to be repute mariage in effect, and inlaicks nathing thaieof bot the solemnisation thairof in face of halie kirk, according to the order observit in this realme, quhilk the said Alexander refusis to solemnize with the said Marion, complenare foirsaid, unless compellit".<sup>1</sup>

These cases show that the Commissary Court compelled couples to solemnise marriage in church where a betrothal had been followed by intercourse. Where intercourse had not taken place, the betrothal could be dissolved at the will of either party. The problem is exactly in what way the subsequent intercourse affected the betrothal - did it make it indissoluble, or did it imply consent 'de praesenti'? It is plausible that betrothal plus intercourse was indissoluble because it was a marriage. Fraser rejects this on the basis that if it were true, the couple would not be punished as fornicators by the kirk-sessions (see 9.2.) and solemnisation in a church would not be required. A suit for adherence would have been more appropriate, as was the practice in the eighteenth century, and not a suit for solemnisation of marriage. He argues that Stair changed the existing law by arguing that the intercourse implied consent to marriage 'de praesenti'. Fraser sees the case of Crawford vs. Harvie of 1732 as setting the precedent. Instead of seeking a decree to compel solemnisation, Katharine Harvie concluded at once that she

"ought to have the saids Commissaries, their sentence and decreet, finding and declaring that the said Katherine Harvie, are husband and wife, and decerning and ordaining him to adhere to

<sup>1</sup> Fraser. 'Husband and Wife'; I, 334.



to her society, fellowship, and company."<sup>1</sup>

The writer does not accept Fraser's interpretation, based largely on the Church's attitude and the belief that the Commissary Courts would not have had an interpretation different from that of the Church. Fraser creates a false antipathy by asking the wrong question - why did the Commissaries not compel adherence in suits for solemnisation of marriage? The Court would find on the suit presented to them: in a suit for solemnisation they would decide whether or not an order for solemnisation should be made, and would not consider an order for adherence unless they were asked. The appropriate question is why in cases of promise plus intercourse before 1700 the party sued for solemnisation and after 1700 sued for adherence, given that the evidence would be similar in both suits? The first point is that many betrothals included the specific promise to marry in the face of the holy kirk. Intercourse did not remove the obligation of solemnisation. The parties may have performed one of the promises - to marry - but could still be pursued to perform the solemnisation. Secondly, promise plus intercourse only created a presumption of marriage until a Court had declared that a marriage actually existed. The decision of the Commissary Court would have been sufficient. Solemnisation was thus enforced as a matter of propriety rather than as something essential for the validity of the marriage. The plaintiff also derived advantages from solemnisation that he or she would not necessarily have gained from a decree of adherence. The whole point of solemnisation was that it was a public ceremony to which

<sup>1</sup> Fraser. 'Husband and Wife'; I, 340. See also: 266-267 (1709).

the congregation were witnesses. The couple were seen to be married, and accepted as such in contrast with the Court's decision which may have seemed more remote and less binding. A Court consisted of fallible men while solemnisation was before God. Solemnisation also ensured that the defendant publicly and irrevocably accepted the decision of the Court. If this is correct something must have happened to make a suit of adherence more advantageous than a suit for solemnisation. Although the eighteenth century has not been studied, this change may reflect a change in the importance of the Church and the Civil Law. There is, for instance, the Act of Toleration which recognised that the ideal of 'one Church one State' was no longer attainable. The 1700's saw further schisms from the Church of Scotland, and the local congregation was less likely to be synonymous with the local community. The Civil Law and its courts also increased their prestige. The significance of Stair was that he went beyond the compiling of 'Practicks' and produced a work that attempted to codify Scottish Law and compared it with Biblical and Roman Law. The abstract principles of law were becoming more authoritative than the local community. An order to adhere by the Commissary Courts was likely to have had more status in the eighteenth century than it would have had in the sixteenth or seventeenth centuries.

### 5.2.3. Summary

There was a need for other ways of proving that a marriage existed than evidence of the contraction of a regular marriage.

Not all marriages were regular and even those that were may have been difficult to prove because of the death of witnesses. The question of proof was particularly important in cases of disputed inheritance, including bastardy and terce.

'Sponsalia de futuro et subsequente copula' as a proof maintained the idea that the exchange of mutual consent was the essence of marriage as it was taken to imply mutual consent 'de praesenti'. It emphasises the importance of intercourse as a feature of marriage, although consummation was not necessary for a marriage to be valid. A betrothal was not something to be entered into lightly, and certainly not as a ploy to gain the consent of a girl to intercourse. Promise plus intercourse was more relevant to the courtship system than irregular marriage. It ensured that the girl had the legal grounds for compelling solemnisation if pregnancy resulted from the anticipation of marital rights. This would ensure that children, who might have been born bastards and thus a liability to the family or the community, had a greater chance of being legitimised. On the other hand, the girl's resistance may have been lessened by the knowledge that she could pursue the father for solemnisation of the marriage.

Cohabitation did not assume the existence of any explicit or implied consent 'de praesenti'. This proof was concerned with evidence that showed whether the couple treated each other as husband and wife, and if the community regarded them as married. It shows that the definition of roles is not an abstract sociological notion but one that was articulated by contemporaries. The Courts recognised that marriage involved a set of expectations of how the couple should behave towards each other, and the way they interacted with the community.

## 6. DIVORCE, SEPARATION AND ANNULMENT.

Under medieval Canon Law (see 3.4.1) there was no divorce 'a vinculo'. There was only separation from bed and board ('a mensa et a thoro') and annulment of marriage. A separation did not alter the validity of the marriage: it permitted the couple to avoid the obligation of cohabitation, as the lesser of two evils in cases of cruelty, and the loss of conjugal rights as a punishment in cases of adultery. Annulment was not the same as divorce although both parties were free to marry. It was a declaration that a marriage could never have existed through some defect in the consent or the ability of the parties. The Reformation marked a radical change in the law (though not necessarily in practice) by introducing divorce on the grounds of adultery or desertion. This is in contrast to the Council of Trent which reaffirmed the law without any changes, despite some opposition especially from the Venetian ambassadors. They argued that it would produce great scandal in some of the dependencies of the Republic (Candia, Cyprus, Corfu, Zante and Cephalonia) where the custom from time immemorial had been to permit remarriage after a divorce for adultery.<sup>1</sup>

The authority of the old consistorial courts was removed by the abolition of the Pope's jurisdiction by Parliament in August 1560. Although in theory their jurisdiction returned to the Crown there was a period during which no single court was recognised as having sole jurisdiction, which makes more difficult the tracing of the development of changes in the law. This assisted local kirk sessions

1 'Trent Canons'; ccxxviii, 194-195.

in advancing claims for a change in the canon law. Even before August 1560, some kirk sessions took it upon themselves to exercise consistorial jurisdiction. Of the eight kirk sessions in existence by 1559 (Ayr, Brechin, Dundee, Edinburgh, Montrose, Perth, St. Andrews and Stirling), at least two granted divorces for adultery before August 1560. Even as late as 1567 the Superintendent and Session of St. Andrews dealt with a case involving proof of marriage by cohabitation.<sup>1</sup>

The pressure for the creation of new consistorial courts came initially from the General Assembly. In July 1562 it presented a supplication to the Queen and Privy Council that judges be appointed to hear divorces

"for the kirk can no longer sustene that burthen, especialie becaus thair is no punischment for the offendars".<sup>2</sup>

This may partly explain, despite the delay, why the Privy Council appointed a commission to report on consistorial jurisdiction in December 1563. It was not until the following February, however, that a royal charter was granted constituting the commissaries of Edinburgh.<sup>3</sup>

This did not satisfy the General Assembly and within seven years they were claiming consistorial jurisdiction. This was advanced in articles to be proposed to the Regent and Privy Council in March 1571:

1 'K.S.Reg.St.Ands' (1); 285, 288-293.

2 'B.U.K.'; I, 23. But see also: 'B.U.K.'; I, 19, 30.

3 'R.P.C.'; I<sup>1</sup>, 252  
Balfour. 'Practicks'; 670-673.

"And, Because the conjunctioun of marriages pertaines to the ministrie, the causes of adherents and divorcements aught also to pertaine to them, as naturallie annexit therto".<sup>1</sup>

This claim was also included in the 'Second Book of Discipline' which was presented to the King in 1578. It may have been an attempt to avoid direct confrontation with the General Assembly or the success of the Assembly's sympathisers in Parliament, that led to the granting of a commission to Parliament in 1578 for representatives of each estate to treat with the College of Justice upon the establishment and jurisdiction of commissaries.<sup>2</sup> No compromise was reached. In April 1581 the 'Second Book of Discipline' was endorsed by the General Assembly. It included the recommendation that

"The dependencies also of this Papisticall jurisdiction are to be aboished, of the quhilk sort is the mingled jurisdiction of the Commissaris, in sa far as they mell with ecclesiasticall materis".

The following November the Commissary Courts were ratified by statute.<sup>3</sup>

Some opposition still remained despite a further ratification by Parliament in 1592 of the jurisdiction, liberties, privileges and immunities of the Commissars of Edinburgh.<sup>4</sup> In June 1595, for instance, the General Assembly asserted that it was proper for them to decide what marriages were lawfull or not by the word of God, so far as concerns the spiritual part.<sup>5</sup> Consistorial jurisdiction was

1 'B.U.K.'; I, 187.

2 'B.U.K.'; I, 371. Balfour. 'Practicks'; 673.

3 'B.U.K.'; II, 507. Balfour. 'Practicks'; 673-676.

4 'A.P.S.'; III, 574.

5 'B.U.K.'; III, 846.

not restored to the Church until after the establishment of Episcopacy. The Act of Parliament passed in 1609 declared that, for the restraining of "unlawfull deforcementis too frequentlie practisit", there shall always be resident in Edinburgh four commissars who will have sole power to hear divorce suits (except for the hereditary right held by the Earl of Argyll). Two of the commissars were to be appointed by the Archbishop of St. Andrews, and two by the Archbishop of Glasgow. The Court of Session was to remain the court of appeal. Jurisdiction was granted subject to the condition that it was

"without ony alteratioun of the present lawes or Introduction of new and uncouth practiques upoun the subjectis and lieges".<sup>1</sup>

It has been necessary to sketch the claims for consistorial jurisdiction for the fifty years after the Reformation as it forms vital background to the following sections. It helps to explain why divorce for adultery was introduced by kirk sessions,<sup>and</sup> complements the dispute over the remarriage of divorced adulterers. The reassertion of the Church's claim for jurisdiction is partly explained by the Assembly's frustration in failing to secure penalties against adultery. The complication arises that it is never certain that the Assembly's pronouncements on the remarriage of adulterers were accepted by the Commissary Courts. Nor is it clear what they mean by unlawfull marriages: an unlawfull marriage could still be valid if it was only against the laws of the country (eg. irregular marriages); but if a marriage was unlawful because it was against divine law it would be invalid (eg. incestuous marriages). Usually unlawfull means invalid. The problem with the remarriage of

<sup>1</sup> 'A.P.S.'; IV, 430-431.

See also: Balfour 'Practicks' 664-665, and 'B.U.K.' III, 1067-1068.

adulterers is that the Assembly appears to argue sometimes that it was against divine law despite the marriage being recognised by the law of the land.

(Consistorial jurisdiction is discussed in D.B.Smith's article on 'The Reformers and Divorce', and by D.H.Fleming in a footnote in 'K.S.Reg. St.Ands' (1): 268-269. Balfour's 'Practicks' is also valuable as he, like some other lawyers, was a commissar both before and after 1560.)

## 6.1 Divorce for adultery.

### 6.1.1. The introduction of divorce.

The Reformers' attitude to divorce for adultery was ambiguous - at least this is the implication of the relevant passages in the first 'Book of Discipline'. The sermon in the marriage service emphasised that marriage was dissoluble only by death and this is repeated in the 'Book of Discipline' with the exception of where adultery had been committed. Adultery had to be proved in the presence of the Civil Magistrate before the innocent party was pronounced free to remarry if they wished; the guilty party should suffer death. The text avoids the obvious point that a divorce suit would not be necessary if the offender was executed as the marriage would be dissolved by death. The civil authorities are relied on for proving and punishing adultery, and it is recognised that the magistrate might not apply the law in all its rigour. If this should occur

"yet may not the Church be negligent in their office, which is



to excommunicate the wicked, and to repute them as dead members, and to pronounce the innocent party to be at freedom".<sup>1</sup>

The Reformers are not using a scriptural justification: they argue that as the adulterer should be dead under divine law, the Church should treat him as if he were dead. Divorce for adultery from this viewpoint is comparable to a legal declaration of death, which dissolved marriage.

The Reformers recognised that this created a difficulty for them as the divorced adulterer could still commit sin and fornicate even though he or she was theoretically dead, and that one of the purposes of marriage was as a remedy for sin. They therefore permitted the adulterer the chance of rebirth:

"If the life be spared (as it ought not to be) to the offenders, and if the fruits of repentance of long time appear in them, and if they earnestly desire to be reconciled with the Church, we judge that they may be received to participation of the Sacraments, and of the other benefits of the Church, (for we would not that the Church should hold those excommunicate whom God absolved, that is, the penitent)."

The first 'Book of Discipline' thus allowed an adulterer to remarry as marriage was one of the benefits of the Church:

"That if they cannot live continent, and if the necessity be such as that they fear further offence of God, we cannot forbid them to use the remedy ordained of God."<sup>2</sup>

1 'Bk.of Disc.'; 318.

2 'Bk.of Disc.'; 318.

The adulterer's choice of partner was restricted to his former spouse if she were reconciled to him, in which case they should remarry in Church without the proclamation of banns. No mention is made of whether the adulterer should be allowed to marry his paramour.

The two final paragraphs in the 'Book of Discipline' emphasise that this advice was a pragmatic compromise forced on the Reformers by their expectation that the Civil Magistrates would not execute adulterers. Divorce for adultery was offered

"as the best counsel that God giveth unto us in so doubtful a case. But the most perfect Reformation were, if your Honours would give to God his honour and glory, that ye would prefer his express commandment to your own corrupt judgements, especially in punishing of those crimes which he commandeth to be punished with death."

The Reformers gave notice in plain language that this compromise was to them unsatisfactory and temporary:

"we require that the law may now and hereafter be so established and executed, that this ungodly impunity of sin have no place within this Realm. For in the fear of God we signify unto your Honours, that whosoever persuadeth unto you that ye may pardon where God commandeth death, deceiveth your souls, and provokes you to offend God's Majesty."<sup>1</sup>

Divorce ('a vinculo') for adultery was not introduced by statute. It was a common law right based on precedents established

1 'Bk.of Disc.'; 319.

by cases heard before individual kirk sessions, especially those of St.Andrews and Edinburgh. For a time after the abolition of Papal jurisdiction - and even before - the kirk sessions exercised jurisdiction in commissary cases on their own initiative, and it was during this period that divorce for adultery was introduced.

The case in which divorce was first granted for adultery by the Kirk Session of St.Andrews started several months before Parliament abolished Papal jurisdiction. The defendant was William Rantoun who had deserted his wife in 1558, and he had taken a room where he had committed adultery, sometimes living with the woman for 15 or 20 days. He had confessed this before the Session and congregation. Elizabeth Gedde, his wife, argued that under the law of God, she should be separated and divorced from him with liberty to remarry. She also asked for the repayment of her tocher, though the Session did not apparently make a decision on this part of her suit. The Session found in January 1561 that William Rantoun was a perjured adulterer

"and the said Elizabeth innocent divorced, and fre of the company and societie of the said Williame, with full power to hir according to the law of God to mary in the Lord; and the said Williame to be haldin and reputte ane dead man, worthy to want his life be the law of God, quhen ever it sall pleas God to stirre up the heart of ane gude and godlie magistrate to execute the same with the civile sword; to quhome we will that this our sentence prejudice nathing, bott committes the same to him, quhen it salbe thocht expedient and ganand (suitable) time to tak forther triall and cognitioun heirintill, according to the law of God forsaid".<sup>1</sup>

1 'K.S.Reg.St.Ands' (1); 37-40, 42, 59, 60.

William was described as a perjurer because he had falsley sworn the marriage oath. The emphasis on William as a 'dead man' and the disappointment with the not-so-Godly magistrate is similar to the 'Book of Discipline'. In this case, however, the session had taken the initiative and relied on its own proof of adultery instead of proof before the Civil Magistrate. There was no mention of William being allowed to remarry as the expectation was that he would be executed. In another case in the same month the adulterer was also committed to the civil magistrates to be punished as prescribed by God's law.<sup>1</sup>

Divorce for adultery was recognised by Parliament in 1563. An Act passed in that year made death the punishment for notour and manifest adulterers. This confirmed the fears of the Reformers that the State would not execute all adulterers as required by God's law. It was thus important that divorce for adultery was put on a permanent basis and was no longer regarded as an expedient until all forms of adultery were punished by death. This may partly explain why the Privy Council appointed a commission to report on consistorial jurisdiction. The Act gave statutory recognition to divorce for adultery by its final clause:

"And als declaris that this act on na wise sall prejudge ony partie to persew for divorcement for the crimes of adulterie befoir committit conforme to the Law." <sup>2</sup>

'De facto' recognition had been given by the State several years earlier when the Privy Council had requested the Kirk Session of St.Andrews to try a divorce suit.<sup>3</sup>

1 'K.S.Reg.St.Ands' (1); 58.

See also: Fraser. 'Husband and Wife'; II, 1139, fn.e.

2 'A.P.S.'; II, 539.

3 'K.S.Reg.St.Ands'(1); 50-59.

### 6.1.2. Remarriage of the guilty party 1566-1589

There was one issue which was debated by the General Assembly throughout the sixteenth century - the remarriage of the guilty party. There would have been no problem if the secular courts applied the punishment of Mosaic Law and executed all convicted adulterers. The Act of 1563 made it clear that not all adulterers would be executed. The 'Book of Discipline' had suggested that an adulterer should be allowed to remarry after reconciliation with the Church. This was only one of several possible alternatives and the subsequent discussions in the General Assembly were an exploration of the different <sup>ways</sup> of reconciling practice and Mosaic law. Some of the different solutions were:

1. no remarriage permitted because the guilty party was regarded as legally dead;
2. remarriage to anyone allowed (eg. 'Book of Discipline');
3. remarriage only after the death of the former spouse;
4. remarriage to anyone allowed, except the paramour;
5. remarriage to anyone after the death of the former spouse, except the paramour;
6. to refuse to solemnise the marriage of a divorced adulterer, and to leave the question of any subsequent irregular marriage to the Civil Courts.

The problem first appears in the records of the General Assembly in 1566, though the wording is ambiguous and may have referred to separation for adultery rather than divorce 'a vinculo'. It was said that great scandals and inconveniences arose because

"diverse persons, alsweill women as men, who are separate for

adultery, the partie offendad joines themselves in mariage againe, contrair to the law of God".

The Assembly ordained the superintendents

"to admonisch all ministers within ther jurisdictiones, that none joine any partie separatit for adulterie in mariage, under paine of removeing from the ministrie".<sup>1</sup>

If this applied to the remarriage of adulterers, the Church was refusing to solemnise such marriages though not condemning them as invalid. However, as these passages did not mention divorce, they were probably referring to separation from bed and board, in which case remarriage would be adulterous and bigamous as the original marriage had not been dissolved.

Two questions were raised six months later in the next Assembly. The first does not concern divorce but is relevant, especially to the Acts of Parliament of 1592 and 1600:

"Quhether if it be lawfull to marie her quhom he befor, in his wifes time, had pollutit with adulterie, his wife now being dead. The kirk will not grant that thing to be lawfull quhilk Gods law damnes, neither yet admitt any sick mariages, for causes conteinit in the law".<sup>2</sup>

The question concerns the legal capacity of the two people to contract marriage after the first marriage had been dissolved by death. The law referred to is probably pre-Reformation canon law, which made invalid a marriage between a man and the woman who had been his paramour while his wife was still alive. The second question was

"Ane man being divorcèit for adulterie, queritur, Quherther

1 'B.U.K.'; I, 91.

2 'B.U.K.'; I, 98.

3 'B.U.K.'; I, 98.

he may marie again lawfullie or not? The kirk will not resolve heirin schortlie, bot presentlie inhibites all ministers to meddle with any sick mariages, quhill full decision of the question."<sup>1</sup>

The Assembly's answer was politically important and this explains their caution and the clamp down on discussion. The previous month, on 15 May 1567, Queen Mary had married Bothwell despite the Church's opposition. Their objections were summarised by John Craig when he was summoned before Bothwell and the Privy Council to explain his tardiness in proclaiming the banns:

"I laid to his charge the law of adulterie, the ordinance of the Kirk, the law of ravisching, the suspicioun of collusioun betwixt him and his wife, the sudden divorcement, and proclaiming within the space of foure dayes, and last, the suspitioun of the Kings death, quhilk her mariage wald confirme."<sup>2</sup>

Bothwell was a divorced adulterer who wished to remarry. By December, the General Assembly had decided what action to take and summoned John Craig and the celebrator, the Bishop of Orkney. Craig was required to make a purgation. The whole kirk found that the Bishop of Orkney had

"transgrest the act of the Kirk in marrying the divorcit adulterer; and therfor deprivis him fra all functioun of the ministrie, conforme to the tenour of the act made therupon, ay and quhill the kirk be satisfied of the slander committit be him".<sup>3</sup>

The Act of the Assembly referred to above and by John Craig has not been traced: it may have been a general prohibition (perhaps that of 1566) or one specifically referring to Bothwell's marriage.

1 'B.U.K.'; I, 98.

2 'B.U.K.'; I, 115.

3 'B.U.K.'; I, 114.

The implication of the Bishop's deprivation is that the Assembly did not permit the remarriage of adulterers, even though such marriages were recognised by the State.

This may explain why, in Articles to the Lord Regent in 1569, the Assembly included the following:

"That the questioun of adulterie may once take effect; at least a decision in that heid, quhither the adulterer sall be admitted to the benefite of marriage or not".<sup>1</sup>

Other articles dealt with the question of the punishment of adulterers. The Assembly was pressing for a solution to the opposing opinions held on the remarriage of adulterers by State and Church. The Assembly wanted either capital punishment for all adulterers or a ruling that the marriage of an adulterer was invalid. The choice given to the Regent in this particular question was false unless the Assembly was willing to admit that the civil courts were better placed to interpret divine law on the validity of marriages though not on the punishment of adultery. The exasperation of the Church implied in the question was based on their dilemma: God's law said one thing and people desired the opposite. This problem is illustrated by a question, and evasive answer, posed in the Assembly of 1570:

"Q. A woman divorced for adultery committed be her, contracting marriage with another, beareth a child to him, and desireth to proceed to the solemnizatione of marriage, Whither shall the man be permitted to marrie this woman. A. Let her present herself to the Assembly to be punished; and then let her supplicatione be

<sup>1</sup> 'B.U.K.'; I, 140.



given in, and she shall have an answer".<sup>1</sup>

The Assembly delayed giving an answer, and no answer has been traced.

No response apparently came from the Regent and the Assembly did not return to this issue until 1576. During this interval the Church reconsidered its attitude to the marriage of an adulterer with his paramour after the first marriage had been dissolved by the death of the spouse. The answer given in 1571 was the same as that in 1567 - such a marriage was unlawful.<sup>2</sup> The uncertainty surrounding divorced adulterers seems to have undermined the Assembly's belief in its right to declare this type of marriage unlawful. In 1574 it was ordained by the General Assembly -

"That Bischops, Superintendents and Commissioners of provinces charge all sick persons so joint in that slanderous and unlessum band, to separate themselves and abstaine fra uther, untill the time it be decidit be the Judge Ordinar, Whither the said mariage be lawfull or not, under the paine of excommunication to be execute against dissobeyers."<sup>3</sup>

Although the Church still believed that such marriages were unlawful, they acknowledged that the civil courts had the right to make the definitive statement. The Assembly was thus recognising the State's authority to interpret divine law. When the question was again put to the Assembly the following year, their reply amounted to a refusal to answer: "A. Ordaines to form this question better."<sup>4</sup>

1 'B.U.K.'; I, 171.

2 'B.U.K.'; I, 197.

3 'B.U.K.'; I, 308.

4 'B.U.K.'; I, 345.

The uncertain state of affairs did not lead to an overt clash with the State until 1576, nine years after Bothwell's marriage. The initiative was taken by the Privy Council who proposed several questions to the Assembly. One of these was:

"Who shall be judges in causes of matrimony and divorcement, of testaments, of the right of patronages, of benefices, of tinsell and deprivation from benefices, of the payment of Ecclesiastical rents and livings, of slanders."<sup>1</sup>

The General Assembly's records do not include a direct answer to this question which related to the whole of consistorial jurisdiction. They were probably aware of the particular case of John Carmichael before the Privy Council. An answer of sorts was given in the Assembly. It is worth quoting at length as the phrasing of the question shows that some members were looking for a fight, while the answer is by contrast temporising and non-committal. The leadership of the Assembly was trying to avoid a confrontation. The question was:

"Whether if a man or a woman divorced for adultery ought to be admitted to the second marriage; and if the Kirk ought not, like as they have inhibit the Ministers to marrie any such, so plainly to give their judgements in this case and to declare it to be unlawfull, specially in respect of the great inconveniences that follow daily therof; namely, some forge causes of adultery; some make causes indeed; and some be collusion corrupt judgements; and all in hope of a new marriage, which daily they attain unto be some hireling smaikes, who are but suspended therefor for a

<sup>1</sup> 'B.U.K.'; I, 371.

while; swa that if provision be not shortly made hereunto, no man may brooke his wife, nor no wife her husband longer than they like; and a barbarous confusion unknown to the very Ethnicks and Turks shall enter in among us.

"A. The Kirk will not presently resolve the question, Whither if a man or a woman divorcit for adulterie, aught to be admitted to the second marriage; but inhibits all Ministers and Reidars to marie any sick persons, under the paine of deprivation simpliciter, without any restitution to thair offices in times cuming; and the persons so jointit, to be chargeit to separate themselves, conforme to the Act of the Assembly in August 1574."<sup>1</sup> There was nothing new in the answer, except perhaps permanent deprivation, and it did not prevent the clash with the Privy Council.

A complaint had been made to the Privy Council by John Carmichael who had been married according to the correct order, after proclamation of banns, in April 1575. His minister, under the authority of the Bishop and Commissioner of Glasgow, had ordered him to abstain from his spouse. Carmichael had presented himself before the Assembly to have the order dismissed because his marriage was "unreduceit or dischargeit null be the Juge Ordinar". The Moderator, the same John Craig as in 1567, refused

"allegeand the Kirk to have maid ane generall Act and ordinance against all personis allegeit adulteraris; quhairby thay haif ordanit the said Johnne Carmichaell to abstene fra his said spous,

<sup>1</sup> 'B.U.K.'; I, 377.

ay and quhill it be decernit and tryit quhiddir thair mariage be lawchfull or not, under the pane of excommunicatioun".

This was the background to the Assembly's act of 1576: the question was a vigorous defence of the Church's actions, and the answer was conciliatory so as not to prejudice the Church's appearance before the Privy Council. Carmichael's arguments questioned the ability of the Church to query the validity of marriages regularly celebrated, and the legal standing of an act of the General Assembly:

"they are mareit, conforme to the ordour of the Kirk, with all solempniteis requirit thairto; swa of the law, it is presumit to be lawchfull and neidis na forder declaratour; ... And attour, gevand thay (the Assembly) have ony sic Act, that Act is bot prevat, na publicatioun being maid thairof, nor yet authorizit by Parliament as it aucht to be befoir it tak effect; and thairfoir is null ...".

The Privy Council summoned before them the Bishop of Glasgow, the Moderator, and Andrew Hay. Hay was required to produce the act and order of excommunication, and he refused

"allegeand the same not yet to be extractit furth of the bukis of the Generall Assemble of the Kirk".

This may have been a way of refusing to recognise that the Privy Council had the authority to examine the acts and actions of the Church without actually doing so. Or it may have been a true excuse as the act of 1576 had only recently been passed and may not have been engrossed in the records. This would emphasise the political and opportunist nature of the act as they could have produced the act of 1574 which lacked the strident condemnation

of such marriages. The Privy Council did not take up the challenge to their authority except by suspending the Assembly's action against Carmichael until the act was produced. No further action is recorded in the Register of the Privy Council. It would appear that the plaintiff had been satisfied and that neither the Privy Council nor the General Assembly were willing to pursue the case and its wider implications.<sup>1</sup>

This action before the Privy Council could have resulted in the resolution of the dilemma which had existed for at least nine years. But nothing happened despite Carmichael's provocative arguments and the Assembly's defence. Neither the State nor the Church was willing to resolve the compromise of the State accepting the marriages of divorced adulterers while the Church refused to have anything to do with them until the Assembly made a decision. The usual reply was repeated when the matter was raised once again in 1581, although the question does reveal that some discussion had taken place on this occasion.<sup>2</sup> Further discussions took place after 1589 when the Assembly

"appointed, that in every Presbytery they shall dispute concerning the marriage of adulterers; and report their judgement the next Assembly".<sup>3</sup>

Although no such reports are referred to in the records, it would appear that the General Assembly had finally decided to do something after twenty-two years of equivocation. These discussions may be associated with the Act of Parliament of 1592.

1 'R.P.C.'; II<sup>1</sup>, 560-561.

2 'B.U.K.'; II, 539-540.

3 'B.U.K.'; II, 746.

### 6.1.3. Remarriage and the Acts of Parliament of 1592 and 1600.

The Act against adulterers passed by Parliament in 1592 was the first that specifically dealt with divorce for adultery. The preamble is as long as the actual enactment and explains why the Act was considered necessary and declares the existing law. The explanation accepted in part the viewpoint of the Church - the crime of adultery daily increases and a great number of people have been divorced because the laws of 1563 and 1581 for the punishment of notour and manifest adultery by death had not been enforced. The result was that the guilty party subsequently married the person with whom he had committed adultery. The Act leaves no doubt that such marriages were invalid under existing law. They were described as "na wayes to be allowit be the law of god and the publict honestie of the realme" and as a "pretendit mariage (which) is rather to be accomptit ane continewatioun of thair former adultery nor ane lawchfull and christiane conjuction". An action of bastardy in 1582 shows that this was the law, as it was argued in that case without contradiction that

"it is expresslie providit be the common law and pretick of this realme that na man may marrie that woman quome he has polutit in adulterie".<sup>1</sup>

The reason for the Act, however, was not the declaration that the marriage of an adulterer with his paramour was invalid: it was the issue of inheritance. It was argued that these invalid marriages "breidid mony questionis in the law" concerning issue and succession and that often the heirs of the lawful marriage had been defrauded

<sup>1</sup> Riddell. 'Peerage Law'; 392-393.

of their rightful inheritance by the adulteress disposing of her lands to her unlawful husband, the issue of their unlawful marriage, or to a third party. It was stated that

"it is providit be the commoun lawis and in all times bigane hes bene ressavit in practice within this realme That the woman being divorceit fra hir housband throw and be hir awin offence sall amit and tyne hir tocher and all uther thingis gevin to hir in respect and for cause of the said mariage".

This is derived from pre-Reformation Canon Law and shows that the laws relating to divorce 'a mensa et a thoro' were used as precedents for dealing with divorces 'a vinculo'. The preamble, for instance, goes on to argue that it is thus provided by

"the commoun law that the woman having committit the said offence and being divorceit thairfoir and mareand the persone with quhome sho committit the offence for qlk the said divorcement followit sall not be hable to enriche hir said unlawchfull housband nor the successioun following upoun the said unlawchfull mariage".

A decision by the Court of Session in 1589 shows that this claim was correct. In the case of Innerwick vs. the Lady it was found that an heiress divorced for adultery lost the life rent of her heritage as well as her conjunct fee and tocher, and that the courtesy took place as if she were dead.<sup>1</sup> It is plausible that the Act was felt necessary by Parliament because a court case had called into question the existing law, particularly as its application to divorce 'a vinculo' was of comparatively recent origin. This would explain why the preamble stressed that the Act

<sup>1</sup> Morison. 'Decisions'; 329.

was not introducing a change in law but only giving statutory authority to what already existed.

The Act ordained that

"quhensoevir ony woman Is or hes bene divorcit fra hir lawchfull spouse for hir awin fault and offence of adultery and compleitis unlawchfull and pretendit mariage with the same persone with quhome scho committit the said offence Or planelie and oppenlie dwellis and resortis in cumpanie with him at bed and burde gif scho haif ony landis heretage takkis roumes or possessionis It sall not be lawchfull to hir to dispone annalie and put away the same in all or in part."

Her inheritance was reserved to the offspring, or her next in line, of the first lawful marriage, and the Act excluded from possession her pretended husband and adulterer and their offspring, or any other person to the hurt and prejudice of the heirs of the first marriage.<sup>1</sup> The specific inclusion of cohabitation is interesting as it suggests that, if the Act was occasioned by a particular law suit, the case may have involved a claim to an inheritance by a marriage proved by cohabitation. The application of the bar was restricted by two qualifications. Firstly, it applied only to adulteresses and not to male adulterers. In the case of Douglas or Lyle vs. Douglas of 1670, for instance, the Court found a disposition by the man, to the issue of the woman with whom he committed adultery, to be a valid deed although it prejudiced his heirs-at-law.<sup>2</sup>

That the Act permitted a man to dispose of his property as he

1 'A.P.S.'; III, 543-544.

2 Fraser. 'Husband and Wife'; II, 1224-1225.



wished, reveals a patrilineal emphasis and discrimination on grounds of sex. This double standard also underlies the Acts against the crime of adultery and is discussed more fully later. The second qualification is that the marriage of a woman divorced for adultery was only unlawful if she married the person with whom she had committed adultery. She was free to marry any other man. This is a throwback to pre-Reformation canon law. The Act was made retrospective and applied to all dispositions and alienations made since the first Parliament held by James VI after he reached his age of majority in 1587. It is not known why this particular event was chosen.

The Act of 1592 cleared the way for the General Assembly to make a pronouncement on the remarriage of adulterers. Since 1566 the Assembly had forbidden ministers to marry divorced adulterers on pain of deprivation; and in 1567 had declared the marriage of an adulterer with his paramour unlawful even after the death of the wife. The Assembly had reserved judgement on remarriage to other people until a decision was made by the Civil Courts. The preamble of the Act made it clear that only the marriage of an adulterer with his paramour was unlawful, and that this would not be extended to other categories. The Church, therefore, had to accept the law as it existed and relinquish any hope that there would be a general law against the remarriage of adulterers, perhaps on the lines of the first 'Book of Discipline'. It may have taken several years for the Church to finally acquiesce as it was not until 1595 that the General Assembly declared two types of marriage to be unlawful:

"first, when ane person marieth another quhom they have poll-  
utit by adultrie; next, quhen the innocent person is content to  
remaine with the (nocent and) guiltie, and the guiltie will have  
another, or takis another".<sup>1</sup>

The former agreed with the Act of 1592 and the earlier decisions  
of the Assembly, and the latter with the first 'Book of Discipline'.  
It is based on the Canon Law principle that only the innocent  
party had the right to sue for divorce, and that a divorce would  
not be granted if the parties had been reconciled after the  
innocent party knew of the adultery.

Some difficulties, however, seem to have arisen in the inter-  
pretation of the Act of Parliament of 1592 as another Act was  
passed by Parliament in 1600. Fraser suggests that a suit of  
adherence and legitimacy at the instance of Dame Margaret Whitlaw  
against her second husband, Sir John Kerr, may have provided the  
opportunity for the Church to secure the passing of this statute.  
Both parties to the suit were divorcees, and Sir John Kerr had  
been divorced for adultery with Dame Margaret. He had been excomm-  
unicated by the Church.<sup>2</sup> This seems to fit in with one of the  
grievances proposed by the Assembly to the King in 1598:

"To crave ane redresse anent adulterous marriages, quher two  
persons, both divorcit for adulterie committit either with uther,  
craves the benefite of the Kirk to be jointit in marriage".<sup>3</sup>  
The King was present in the Assembly and gave his answer the same  
day. He recommended that a supplication should be given in to the

1 'B.U.K.'; III, 855.

2 Fraser. 'Husband and Wife'; I, 142-143.

3 'B.U.K.'; III, 937.

next Parliament, asking for a declaration that the marriage of adulterers to their paramours should be declared null, and any offspring illegitimate.<sup>1</sup>

Accordingly in 1600 the Assembly directed that a supplication should be handed in by "the brethren appointit to awaite upon the next Conventioun" craving an Act forbidding all marriages of people convicted of adultery and that the Act should be ratified in the next Parliament. It was argued that this was necessary

"Because the mariage of persons convict of adulterie, is a great allurement to married persons to committ the said crime, thinking therby to be separate from their awin lawful halfe marrowes, to injoy the persons with quhom they have committit adulterie."<sup>2</sup>

The Act that was passed by Parliament in 1600 was much shorter and in plainer language than that of 1592. It is worth quoting in its entirety as it is not immediately clear either from the petitions by the General Assembly or the actual Act what changes it made to the law.

"Oure Soverane Lord with the advise of the estattis of this present parliament decernis all marriages to be contractit heir- eftir be ony persones divorceit for thair awin crime and fact of adulterie frome thair lawchfull spouse with the persones with quhome they ar declarit be sentence of the ordinar Judge To have committit the said crime and fact of adulterie To be in all time cumming Null and unlawchfull in thair selfis And the successioun

1 'B.U.K.'; III, 938.

2 'B.U.K.'; III, 953.

to be gottin be sic unlawchfull conjunctionis to be unhabill to succede as airis to thair saidis Parentis." <sup>1</sup>

The Act does not claim to declare existing law which suggests that it did change the interpretation of the Act of 1592. Riddell may be right when he suggests that it had been argued that the Act of 1592 merely precluded the marriage of divorced adulterers during the lifetime of the innocent party. His further suggestion that it extended the prohibition of alienation of 1592 to the male adulterer as well as the adulteress may be doubted because of the Douglas case of 1670 previously cited. <sup>2</sup>

The King's agreement to the Assembly's petition in 1598 meant that Parliament could not refuse to pass an Act, though its treatment in 1609 of his letter recommending an Act anent Ravishment (see 4.4.3.2) shows that it was not a rubber stamp. The Act, however, had one flaw - it specifically required a judgement by the ordinary Judge (ie. Commissary Court) to preclude the parties from marrying. This was used by collusion to evade the Act: the pursuer of a divorce libelled that the defender committed adultery by some person who was seen but could not be identified, thus avoiding the introduction of the paramour's name into the decree of divorce. <sup>3</sup> It has been said that even in the 1950's care was still taken not to name the correspondent in the decree of divorce as there was some doubt as to whether or not the Act of 1600 was still in force. The same author also believed that there are no recorded cases of this prohibition being put into operation. <sup>4</sup>

1 'A.P.S.'; IV, 233.

2 Riddell. 'Peerage Law'; 400, 409.

3 Fraser. 'Husband and Wife'; 145. Guthrie, 'Divorce'; 51.

4 Ashley. 'Honourable Estate'; 55.

The Act of 1600 seems to mark the end of the debate on remarriage of adulterers. The Church does not appear to have opposed the compromise, even in the 1640's or the 1690's. The only bar on remarriage remained that between an adulterer and the person named in the decree of divorce.<sup>1</sup> There was only one piece of Parliamentary legislation in the seventeenth century, and it probably made easier proof of adultery in a divorce suit. The Act of 1644, rescinded at the Restoration, dealt with the nature of the evidence required for a divorce. It was intended to remedy the great prejudice that many people suffered because a sentence of divorce could be obtained only

"upoun probatioune of the fact of Adulterie 'per testes scientes et videntes' which kind of probatioune is in some cases impossible".

Parliament ordained that a decreet of divorce would be given upon

"probatione of the fact of Begamis or upoun probatioune that bairnes ane or more are procreate in adulterie or upoun probatione that persones under scandall of Adulterie kepted frequent company and bed togedder".<sup>2</sup>

The effect was to roughly equate the methods of proof in both criminal and divorce cases as the new types of evidence were included within the definition of 'notour adultery' as made by Act of Parliament in 1581.

#### 6.1.4 Summary.

The acceptance of divorce for adultery by the Church of Scotland was a great change in ideals; no longer was the bond of marriage

1 Hermand. 'Consistorial Decisions'; 92. Morison. 'Decisions'; 329-330. Stair. 'Institutes'; 27.

2 'A.P.S.'; VI, pt.I, 194.

dissolved only by death. This change is the more surprising in that there was no unequivocal scriptural justification as there was, for instance, in the revision of the forbidden degrees. The basic text was Christ's reply to the Pharisees in Matthew, chapter 19, verse 9:

"And I say unto you, Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and whoso marrieth her which is put away doth commit adultery". This verse provided scriptural authority for allowing divorce 'a vinculo' for adultery, and for forbidding the remarriage of the guilty party. However, the same incident is also referred to in chapter X, verses 11 and 12 of the gospel according to St. Mark, and there the crucial phrase 'except it be for fornication' is omitted. There were also many texts which were used, as in the form of marriage, to show that marriage was dissoluble only by death. St. Paul only refers to divorce 'a mensa et a thoro' - for instance, I Corinthians, chapter VII, verses 10 and 11:

"And unto the married I command, yet not I, but the Lord, let not the wife depart from her husband: but and if she depart, let her remain unmarried, or be reconciled to her husband: and let not the husband put away his wife."

It is also noticeable that the Church of Scotland still maintained the ideal of the indissolubility of marriage except when talking about divorce or adultery, as does the present church service.

Although the Canon Law only recognised 'separations', it is probable that before the Reformation many people divorced 'a mensa

et a thoro' subsequently cohabited or married. It is not possible to say how widespread this was, or whether this abuse was restricted largely to the nobility in their pursuit of wealth and political power. Certainly contemporary commentators believed it was too common. John Major in his 'History of Great Britain', for instance, wrote that

"I take this occasion to say that the Scots of our time resort to divorce too lightly; and most laymen think it is sufficient for their souls' salvation that a divorce should be pronounced in the consistorial court on the statement of false witnesses; and so they live in adultery with other women they think to be their wives."<sup>1</sup>

The Reformed congregations were faced with the same problem as the Venetian ambassadors at the Council of Trent: whether to enforce the strict interpretation of existing law, or to change the law so that what was unlawful became legal. Some of the congregations chose to legitimise deviant behaviour. It is interesting that the 'Book of Discipline' does not seek to justify divorce for adultery: it accepts divorce without even any rationalisation and deals with practical problems. The attitude is distinctly unenthusiastic, as is shown by the plea for the State to remove the problem by executing adulterers as required by God's law.

This absence of a positive attitude from the Church continued after 1560 and the General Assembly failed to give effective moral leadership over the question of the remarriage of adulterers. The Church failed to capitalise on the confusion in~~in~~ consistorial jurisdiction after the abolition of Papal jurisdiction by introducing

<sup>1</sup> Book V, c.23; published 1521. Quoted in: D.B.Smith. 'Case of collusion'; 99.

its own ideas into the courts. The General Assembly in the early 1560's discouraged the consistorial activity of the kirk sessions, and confined its energies mainly to putting pressure on the civil authorities to make a decision. This was probably partly a result of their belief in a Godly Magistrate. The crisis came in 1567 with the clash between the Privy Council and the General Assembly over the marriage of Mary and Bothwell. The Church gave in eventually and left the initiative with the state - its reply of 1567 was to be repeated, with some exceptions, for the next ten and possibly twenty-five years:

"The kirk will not resolve heirin schortlie, bot presentlie inhibites all ministers to meddle with any sick mariages, quhill full decision of the question."<sup>1</sup>

It is not surprising therefore that the question of the remarriage of adulterers was decided by authority of Parliament in its Acts of 1592 and 1600.

The Acts were very limited in scope: the only person the adulterer could not marry was the corespondent named in the divorce decree. The qualification of the Act of 1600 may explain why it was not amended in the seventeenth century, apart from the minor codification made by Parliament in 1644 which was rescinded at the Restoration. There was no point in changing a disability that could be avoided. This concession by the State was probably intended to make the main points of the Acts more acceptable to the Church: that the divorced adulterer was free to marry almost anyone. It probably represents a triumph of social practice over

<sup>1</sup> 'B.U.K.'; I, 98.



principle. One point of the Church's attitude was retained, however. The 'Book of Discipline' and some of the sentences of the Kirk Session of St. Andrews used the concept of civil death - the convicted adulterer should be treated in law as if she were dead. The same idea summarises the effects of the Acts of Parliament of 1592 and 1600 on the disposition of property, and occurs in later law suits. For instance, in a decree of divorce declared by the Commissaries in 1719, an heiress was said to lose her rights under the contract of marriage

"as if she were naturally dead, conform to the common law and daily practice always observed in the like cases".<sup>1</sup>

Divorce for adultery shows not only the radical nature of the Reformation in making an exception to the indissolubility of marriage, but also the continued importance of Canon Law <sup>under which</sup> only the innocent party had the right to sue for a divorce and if the innocent party committed adultery after the separation the decree was cancelled and the parties reconciled. The tenet was that crimes of the same kind cancelled each other out.<sup>2</sup> This was incorporated into the law after the Reformation. The Court of Session in 1561, for instance, decided in Logan versus Wod that

"the husband may not part with his wife, or seek to be divorcit fra hir, be ressoun of adulterie committed be hir, gif he in likewise, hes given the use of his bodie to ony uther in adulterie, and efter the committing thereof, na wayis was reconcilit to his wife thereanent".<sup>3</sup>

1 Hermand. 'Consistorial Decision'; 72-73.

2 Hay. 'Lectures'; 69.

3 Morison. 'Decisions'; 339.

The first case in the Commissary Court, according to Fraser, where recrimination was not a bar to divorce was in 1698 in Tarbet versus Gordon.<sup>1</sup>

Canon Law may also have influenced the eventual settlement of the question of the remarriage of adulterers. Adultery did not prevent the contract of marriage between an adulterer and his paramour after the death of the spouse except in two instances. One was bad faith which was interpreted by Hay as a form of bigamy:

"A married person who contracts marriage with a married or unmarried person, and then has carnal copula cannot contract marriage with him or her even after their lawful partners are dead, provided both partners know that they are married, when the adultery is double, or both know that the married person is in fact married when the adultery is simple. If they do contract marriage, it is invalid."

This also applied where the man promised during his spouse's lifetime to marry his paramour after the death of his wife. The impediment applied equally to both sexes.<sup>2</sup> The second was the diriment impediment of wife-murder or qualified adultery. This was where the adulterer agreed to kill his spouse and marry his paramour. The impediment did not apply where the wife was murdered because she was found in adultery. The agreement needed to be very specific:

"For this kind of adultery to prevent marriage being contracted and nullify the contract with the partner in adultery, the adultery

<sup>1</sup> Fraser. 'Husband and Wife'; II, 1197.

<sup>2</sup> Hay. 'Lectures'; 73.

must be actually committed and the murder actually carried out with the primary intention that the adulterer may be able to marry the other woman, so that the precise purpose of the murder is marriage with her."<sup>1</sup>

Both of these instances concern the relationships between the adulterer and his paramour, and are based on the idea that the guilty should not benefit from their crimes. The Acts of 1592 and 1600 are also concerned with the adulterer and his paramour. It is plausible that the Canon Law was interpreted in rather general terms as not permitting the marriage of an adulterer and his paramour, particularly as the Act of 1592 claimed to be declaring the existing law.

The Acts of Parliament of 1592 and 1600 support the idea that the condemnation of adultery was closely associated with ideas about property and inheritance. This will be dealt with more fully under the section on adultery (see 8.6), though it should be noted that this accounts for the emphasis on adultery by the woman. There was the fear that the husband's lawful issue would be defrauded of their just inheritance by children conceived by his wife in adultery. The husband had to trust his wife as it was only she who actually knew who was the father of her children.

Divorce for adultery also demonstrates that moral issues are not clear cut: the Bible was not always as direct as the Ten Commandments. There was still a need for interpretation and it was not possible to say in every case what was right or wrong. In the issue of whether divorce was 'a vinculo' or merely 'a mensa et a thoro', the Church

1 Hay. 'Lectures'; 47, 49, 59.

of Scotland (or at least the earliest kirk sessions) appear to have interpreted the Bible with an eye to contemporary social practice. With the question of remarriage for adulterers, the Church did not find its own way out of its dilemma but left the initiative to the civil courts. The question of morality was not something that was considered in the abstract and society did have a choice even when morals were regarded as absolute and unchanging.

## 6.2. Divorce for desertion

The history of divorce for desertion is different to that of divorce for adultery. It was introduced some time after the Reformation by Act of Parliament, and not by kirk sessions. The very few references in the sources used to divorce for desertion suggest a lack of controversy. Certainly there appears to have been no dispute as to whether the divorced deserter could remarry: it is not even possible to say definitely if such a marriage would have been valid though the absence of a declaration to the contrary suggests that remarriage was permitted.

There was apparently no pressure from the General Assembly to allow divorce for desertion. This may have been because the existing remedies were thought adequate. As under Canon Law the deserted party could sue for adherence before the Commissaries. This first alternative was endorsed by the Assembly in 1570 in the usual form of a question and answer:

"Q. What shall be done, where a man repudiats his wife and bairnes without a cause, and no wayes will receive her againe.

A. The minister sould labour for reconciliation; and the partie offendit complaine to the Judge competent."<sup>1</sup>

It was probably common for the deserter to commit adultery and bigamy by cohabiting or unlawfully marrying someone else. The deserted party could then sue for a divorce on the grounds of adultery. In at least one case this led to inquiries being made abroad. In 1560 David Gudlawde wished to marry Catherine Niesche, "haifand respect to my aige that I may nocht be at ease allane". He had been deserted by his wife, Margaret, in 1524 and some of her friends complained when the banns were proclaimed. The Kirk Session of St. Andrews wrote to the minister of Lund in Denmark, and he confirmed that Margaret had committed adultery with John Boukle under the pretence of marriage. The Session gave leave for David to remarry on this proof of adultery.<sup>2</sup> Equally the deserted party was punished for adultery if they cohabited or unlawfully married without proof of their spouse's death.<sup>3</sup> If the innocent party wanted to remarry they were required to produce a testimonial proving the death of the spouse before the Church would permit the marriage.<sup>4</sup>

These three remedies - suit for adherence, divorce for adultery, and proof of death - all depended on the innocent party being able to trace their spouse. Where this was not possible, the innocent party may never have been permitted to remarry, and would thus unjustly suffer because of another's crime. A possible remedy in such cases was a declaration of the presumption of death. This

1 'B.U.K.'; I, 171.

2 'K.S.Reg.St.Ands' (1); 44-50.

3 'B.U.K.'; I, 91 (1566), 173 (1570).

4 'B.U.K.'; I, 80.

appears to have been the remedy proposed by the Synod of Fife in 1614 when it was asked if a wife could remarry as she had been deserted by her husband eleven years before and there was no certainty as to whether he was alive or dead. The procedure was for the guilty party to be summoned, at intervals of sixty days, three times at his last parish church, the market cross of the head burgh of the latter, and at the pier of Leith to appear before the Archbishop at a certain day and place. If he failed to appear and ~~no-one~~ appeared in his name, the innocent party was to be given leave to remarry.<sup>1</sup> The phrasing of the Synod's answer suggests that this was a novel process and not a reiteration of existing practice. That it occurs after divorce for desertion was allowed, points to a weakness in the Act of Parliament: it assumes that the whereabouts of the deserter was known.

The Act of Parliament of 1573 anent "thame that divertis fra utheris being jointit of befoir in lawchfull Mariage" was passed as a direct result of the Earl of Argyll's marital problems. There is no evidence to suggest that the General Assembly wanted divorce for desertion. There was no lawful issue from his marriage to Jean Stewart in 1553, although he had fathered several illegitimate children. He would have been unable to sue for a divorce on the grounds of adultery because of the principle of recrimination even if his wife had committed adultery. In 1571 the Earl pursued his wife before the commissaries for divorce on the grounds of refusal to adhere. The novelty of his suit was shown by Thomas Craig being

1 'Synod of Fife'; 75-76.

assigned a term "to inform of the lawis allegit that the cause libelit est causee divortii". The following year the Earl initiated proceedings in the General Assembly for the adherence of his wife.<sup>1</sup>

His case was still being considered by the Assembly in March 1573. In the sixth session a committee was appointed "anent the difficulty of the question of divorcement betwixt my Lord Argile and Jean Stewart his spouse". The importance of the case is reflected in the membership of the committee, five of whom formed a quorum: Robert Pont, Senator of the Court of Session and Minister; David Lindsay of Leith; James Lawson of Edinburgh; Clement Little, Advocate; Alexander Arbuthnet, Principal of the College of Aberdeen; John Row, Minister of Perth; John Craig, Minister; and Robert Hamilton, Minister of Saint Andrews. The committee were to meet the day after the dissolution of the Assembly, and to meet and reason with such persons as were appointed by the Earl of Argyll. The Assembly recognised that no definitive answer might be forthcoming by establishing a further procedure should this occur. It was appointed that

"the question being reasoned and brought to ane head wherein doubt standeth, wherein the said brethren cannot then instantly give resolute answer, that the samine head be penned in proper terms, which my said Lord shall send to such reformed Kirks as shall be named be the forsaidis brethren, upon his Lordships own expenses; whose resolution being authentically obtained, the Assembly promiseth to give to his Lordship their declaration thereto".<sup>2</sup>

<sup>1</sup> Riddell. 'Peerage Law'; 548. Guthrie. 'Divorce', 44.

<sup>2</sup> 'B.U.K.'; I, 262-263.

No further mention occurs in the records of the General Assembly and it is probable that the meeting did not take place. The Act of Parliament was passed on the 30 April and the Earl obtained a divorce under the Act of 23 June 1573. He married again on the 8 August and died on 12 September 1573.

It is possible that the Assembly already knew by their seventh session that an Act of Parliament would be passed. One of the questions raised at that session concerned the marriage of the deserted party. The husband had left the country seven years before and had married again while abroad. It was <sup>s</sup>asked if his first wife was guilty of adultery as she had remarried. Similar questions had been asked in previous Assemblies, but the answer this time included a new qualification:

"A. Both are adulterers, unlesse the sentence of divorcement had bein pronouncit be the Judge."<sup>1</sup>

This could refer to a divorce for adultery and may well do so, but it might refer to divorce for desertion, in which case the Assembly already knew of the Act before Parliament and had accepted it as a 'fait accompli'.

There are several distinctive features of the Act anent "thame that divertis fra utheris being Jointit of befoir in lawchfull Marriage".<sup>2</sup> The first is that the preamble asserts that the Act is merely declaring the law as it had been recognised since August 1560. The assertion is false as previously only divorce 'a mensa et a thoro' had been permitted in cases of desertion. This point was

1 'B.U.K.'; I, 267.

2 'A.P.S.'; III, 81-82.



made in the Countess' action before the Court of Session for a reduction of the Earl of Argyll's decret of divorce; it was argued that

"as the process therupon beiris, and that the samin actione is ane novalte - befoir thai proceid theruntill, thai will haif the advise of the Prince, and thre Estaittis lawfullie convenit, upon the interpretation of the Act of Parliament libellit, and quhat may result therupon."

(Riddell. 'Peerage Law'; 550. The suit continued after the Earl's death and the decision is unknown. The case may have continued under appeal until the Countess' death as she enjoyed the settlement she had forfeited under the divorce.)

It was not uncommon for it to be said that an Act was merely declaring existing law, for instance the Act of 1592 against adulterers, but it was unusual to name a specific date. The purpose of this may have been to bolster the validity of the Act by associating it with the Reformation 'settlement'; it was in August 1560 that Parliament had abolished Papal jurisdiction. It also ensured that the Earl of Argyll's actions before the Act was passed could be accepted as part of due process under the law.

The process for a divorce for desertion established by the Act was complicated, and involved actions before both the Commissary Courts and officers of the Church. The first step was to prove before a Judge that the person had deserted without "ane ressonabill caus" and remained away "in thair malicious obstancie" for four years, refusing all private admonitions to adhere. The next stage was for the deserted party to sue for adherence before the

Commissary Court. Where no sufficient cause was alleged in defence and judgement went against the deserter, the third stage was for the deserted party to obtain from the Court of Session letters of four Forms. The effect of these was to declare the deserter a rebel and to put him to the horn for contempt. The next step was to require the Archbishop, bishop or superintendent of the offender's place of residence to direct private admonitions for him to adhere. If these were ignored, the Archbishop, bishop or superintendent was to order the minister of the offender's place of residence (or of the adjacent kirk if there was no minister or the minister refused) to proceed with public admonitions. If these failed, the sixth step was to excommunicate the offender. This being done there was a sufficient cause for a divorce on the grounds of the "malicious and obstinat defectioun of the partie offendar", and the offender relinquished their tocher and 'donationes propter Nuptias'.<sup>1</sup> The procedure is cumbersome, especially as it requires action by the Commissary Court, the Court of Session and the Church. Riddell notes that the different stages tally and correspond with the actions taken by the Earl of Argyll in his suit for divorce, and it may be that his case was used as a model for the Act of Parliament.<sup>2</sup> The process of excommunication has an added significance as it may be an attempt to associate more directly the law with the scripture used as its authority. The Biblical authority is weak and rested on I Corinthians VII, verse 15:

"But if the unbelieving depart, let him depart. A brother or sister is not under bondage in such cases: but God hath called us to peace."

1 'A.P.S.'; III, 82.

2 Riddell. 'Peerage Law'; 552.

An excommunicant could be equated with an unbeliever.<sup>e</sup> Apart from its complexity, the Act had another weakness already noted in that it assumed the offender's place of residence was known.

The Act of 1573 remained unaltered by statute until the Conjugal Rights (Scotland) Act of 1861 which greatly simplified the procedure by removing the preliminaries, and the Divorce (Scotland) Act of 1938 which reduced the period of desertion to three years. Hope summarises the procedures as laid down in 1573 without any comments or amendments.<sup>1</sup> There were attempts to amend the Act by statute in the 1690's. On 9 October 1696 a draft of an act anent divorce for non-adherence was read for the first time and ordered to lie on the table. The same action was taken on 24 August 1698 with an Act with the same title.<sup>2</sup> It is not known what changes, if any, were proposed in these two Acts. Certainly there was a need to revise the reference to Archbishops, bishops and superintendents. Possibly the Act was intended to give statutory authority to some interpretations of the Act which were noted by McKenzie fifteen years before. For instance, he says that the Commissars dated the four years from the time of desertion and not from the granting of a decree of adherence. Refusal to adhere through non-appearance also appears to have been sufficient to prove malicious desertion. The procedure of letters in forms had been superceded by letters of horning summarily granted on all decreets by Commissars, Sheriffs and others.<sup>3</sup>

Divorce for desertion rarely appears in the sources used in this thesis, and it is one of the subjects where an examination of

1 Hope. 'Major Practicks'; I, 137.

2 'A.P.S.'; X, 67, 146.

3 MacKenzie. 'Observations'; 186-187.

the manuscript records of the Commissary Court would have been valuable. Certainly, the Earl of Argyll was the prime mover, perhaps even the sole mover, for the Act of 1573 and as Chancellor he had the necessary influence. Yet even so, such a change in the law should have brought forward some comment from the Church especially as the scriptural authority is not particularly convincing. Perhaps the lack of comment is due to a bias in the sources. The complicated and no doubt costly procedures may show that the intention of the Act was to permit the Earl's divorce while discouraging similar suits by other people. The only way the Earl could remarry lawfully was to change the law, and the lack of offspring may have encouraged him to take radical measures. Divorce for desertion was, however, accepted by the Courts and the Act did not fall into desuetude. The principle of the indissolubility of marriage was compromised permanently.

### 6.3. Separation and annulment.

#### 6.3.1. Separation from bed and board.

Although divorce 'a vinculo' was allowed on the grounds of adultery or desertion, decrees of separation 'a mensa et a thoro' continued to be granted. Neither Parliament nor the General Assembly made any reforms to this part of the law, and the Commissary Courts still acted on the principles of Canon Law. The Church continued to maintain that cohabitation was an obligation of marriage. If a married couple separated from each other without a decree, either the Church courts or one of the parties acting through the Commissaries could sue for adherence. A separation did not affect the existence of the marriage. The Restoration 'canons', borrowing directly from those of 1636, was merely following a long tradition when it stated:

"In all sentences of separation 'a thoro et a mensa' there shall be a caution inserted, that the parties so separated shall live continentlie and chastlie, and not contract marriage with anie person dureing each others life."<sup>1</sup>

A separation could be granted on the grounds of adultery, or of cruelty which was not a cause for divorce. Cruelty is rather an understatement as it meant physical abuse over a period of time, usually of such severity that it was reasonable to fear that the pursuer's life would be endangered by further cohabitation. This was a slight relaxation from Canon Law which required attempted murder.<sup>2</sup>

<sup>1</sup> Lamb. 'Ecc. Rules'; 172-173. Laud. 'Works'; V, 595.

<sup>2</sup> Hay. 'Lectures'; 69.

There was a limit to the amount of force a husband could use to chastise his wife. The degree of violence needed for a separation can only be appreciated by examining actual cases.

Some suits were made to the Privy Council rather than the Commissary Courts as their authority was sometimes needed to prevent further violence and to secure payment of maintenance. One case involved Katherine McCulloch, who had refused to make over to her husband her hereditary rights to the lands of Kindeis. In January 1604 her husband ceased trying to persuade her by words: he

"maist schamfullie and barbarouslie tirrit the said compleiner of her haill cloathing, not leaving sameikle upon her as the sark, and with a bridle he leishit and strake the said compleiner over all the pairts of her body, to the effusion of her bluide in grite quantite."

She tried to escape and seek refuge with the minister of Tain, but her husband caught up with her, bound her hands and feet, and beat her even harder. Not surprisingly, she "lay bedfast in grite disease and dollor ane lang space thairafter". But that was not all: her husband later twice tried to strangle her in bed, and once severely punched and kicked her to the "grit hazard of her life". The Privy Council decerned that the couple "were not disposed to live in conjugall amitie and societie", and that they should separate until "it should please God to unite thaim in hearts".<sup>1</sup>

There is some doubt as to when cruelty was redefined to include

<sup>1</sup> 'R.P.C.'; VII<sup>1</sup>, 159, 184-185.

See also: 'R.P.C.': III<sup>1</sup>, 597-598: 'A.P.S.': VI, pt II, 742-743.

non-physical forms of violence. Lord Hermand found only one case, Grizell Baillie vs. Alexander Murray in 1714, where the decree of separation was granted on what might be called mental cruelty.

Grizel Baillie was allowed to live apart from her husband

"without any other proof but the pursuer's oath of calumny, and certain letters under the defender's hand, which showed that he was affected with the rage of jealousy to such a degree, that not only made the pursuer uneasy in his company, but exposed her to the hazard of her life if she should cohabit with him."

No libel was made in this case of bodily maltreatment.<sup>1</sup>

It was not until 1850 that the House of Lords rejected the view that personal violence was necessary. Cruelty only became a ground for divorce in 1938 under the Divorce (Scotland) Act, and the basic attitude remained that the intention was only to afford protection to the injured party.<sup>2</sup>

#### 6.3.2. Annulment - impotency.

The Reformers simplified the impediments by abolishing the distinction between impedient and diriment impediments, thus removing the need for dispensations. After the Reformation there only existed diriment impediments. However, the impedient impediment of abduction was incorporated into the law of rapt (4.4.3.2.), and that of wife-murder may have influenced attitudes towards the marriage of an adulterer with his paramour. Most of the diriment impediments were retained, for instance, errors in the substantials - for example

<sup>1</sup> Hermand. 'Consistorial Decisions'; 124-125.

<sup>2</sup> Ireland. 'Divorce'; 98.

confusion over identity - made void marital consent unless superceded by subsequent consent.<sup>1</sup> The impediment of force and fear (4.4.3.1.) and qualified adultery have already been discussed. Others will be discussed later - incest and public propriety, and non-age (appendix 2). A pre-existing marriage also annulled a subsequent marriage, unless a divorce had been granted on the grounds of adultery or desertion. Suits for annulment on the grounds of bigamy, however, appear to have been rare: Lord Hermand found six examples "so far I have perused it" and these were usually brought in the same form as divorces upon the head of adultery.<sup>2</sup> The Reformers appear to have abolished only three diriment impediments. These were spiritual relationship, vow of chastity as clerical marriage was permitted, and legal adoption which before the Reformation appears to have been unused in Scotland.

The only impediment which has not been mentioned above is impotency, although consummation was not necessary for a valid marriage. According to Stair

"the Consent of Persons natually impotent, or of dubious (gender) Hermaphrodites, where the Sex doth not eminently predomine, doth not make Marriage".<sup>3</sup>

As under Canon Law for a marriage to be annulled on these grounds it was necessary for the impotency to be present before the marriage and for both parties to be ignorant of it at the time of consent to marriage. Infertility was not a ground for annulment,

1 Stair. 'Institutes'; 26.

2 Hermand. 'Consistorial Decisions'; 94. See also: MacKenzie 'Laws and Customs', 186, 'R.P.C.' IV<sup>2</sup>, 159-160; and 'Justiciary Cases' I, 164.

3 Stair. 'Institutes'; 26.



nor was impotency only with the wife.

The evidence required for a marriage to be declared null is illustrated by an unsuccessful suit heard by the Kirk Session of St. Andrews in 1562. It was alleged that the marriage between John Gib and Margaret Hillok was void,

"he being Impotent of natur (,) hes never knawin hir carnaly nor ony other woman at ony tim nor habill tharto".

He confessed that

"his secreit membre falyeit him wes never ereckit nor stud to hir. And at the falt wes on his part onlye And at sche schew hir willing and obedient to him offering hir body redy to him in all behalves."

The Session carried out several trials to avoid the risk of collusion, and these proved he was impotent with his wife. The suit failed because John Gib admitted intercourse with another woman, which was substantiated by witnesses who proved him capable of erection, and to collusion as he had agreed to the suit at the request of his wife as he wanted to marry another woman. A divorce was granted, however, on the grounds of his adultery. His wife was given liberty to remarry and he was turned over to the magistrates for punishment.<sup>1</sup>

These cases of impotency are particularly interesting as they include evidence to prove that the impotency of the husband was not caused by refusal or frigidity in the wife. There is thus material which stresses the role of the woman in sexual intercourse. The significance of the cases goes beyond providing individual

<sup>1</sup> 'K.S.Reg.St.Ands' (2); 304-312.

illustrations: they have a normative value and show the kind of behaviour regarded as expected or normal. It was the function of this kind of evidence in the court cases to prove that the sexual side of the marriage was normal except for the fact of impotency. For instance, in a suit of 1690 it was stated that

"during all the time he bedded with her, nor since, he never had any erection, any emission, nor any desire to know a woman, though the pursuer frequently kissed and embraced him, and never hindered to put his hands on any part of her body that might allure him".

A more detailed description was given in a case heard three years later:

"though the night they were married, and many weeks and nights thereafter, she gave him all encouragement and invitation, by kissing and clapping him, and by prostrating herself upon her back having her legs spread, and embracing him with her arms; yet all these provocations were ineffectual, and that, though he essayed and attempted to know her, he never did so much as take her by the navel or privy member." <sup>1</sup>

These suggest that sexual techniques included foreplay and 'active' participation by the wife. They are a reminder that eroticism within marriage was not a discovery of this century. This is emphasised by the reason why impotency was an impediment - one of the principal causes of marriage was the avoidance of fornication, and marriage could not be a remedy for the wife if her husband was impotent. This recognised that the wife could have sexual desires. <sup>2</sup>

<sup>1</sup> Hermand. 'Consistorial Decisions'; 76: see also 77 for a description of a trial to prove impotency.

<sup>2</sup> eg. Pitcairn. 'Trials'; I\*, 460-461.

However, the wife was sexually subordinate to the husband as a woman's frigidity under Canon Law did not prevent the contracting of marriage or nullify the contract.<sup>1</sup>

#### 6.4. Summary

The Reformers introduced great changes in the law affecting the breakdown and annulment of marriages. These changes were reforms in respect of the impediments to marriage, except perhaps clerical marriage and the forbidden degrees which were revolutionary. The law relating to separations was left unaltered. These reforms appear to have been a combination of a return to the basics of divine law and the removal of inappropriate or unworkable impediments, for example spiritual relationship and legal adoption. The latter implies a compromise between social practice and Canon Law. This equally applies to the more revolutionary introduction of divorce for adultery. The same cannot be said for divorce for desertion, which was not the result of pressure from the Church. Both were exceptions to the cardinal principle that marriage was dissoluble only by death. Annulment was different as it was a declaration that a marriage never existed due to defective consent or incapacity of the parties, and separation did not affect the existence of the marriage.

One of the difficulties was deciding in how far social practice should compromise principles. Divorce for adultery appears to have been the extreme limit as far as the Church was concerned, and originally it was viewed as a temporary expedient until adulterers

<sup>1</sup> Hay. 'Lectures'; 105.

were punished by death. The General Assembly was faced with the problem of the remarriage of adulterers when divorce for adultery could no longer be regarded as a temporary measure. The Church failed to provide leadership on this issue and it was left to Parliament to decide on the remarriage of adulterers.

The Reformers were successful in reaching a compromise between principle and social practice. The principles on which the settlement was based were not questioned for 300 years. There was sufficient conformity with social practice for the laws to remain unaltered. This was no doubt helped by the use of adversary procedures. Divorce was originally conceived as a punishment of the guilty and a reward for the virtuous. It was thus necessary to prove guilt by the proof of facts regarded as relevant by the law. But the divorce might be wanted by both parties, and one of them might refrain from contradicting the petitioner's allegations or choose not to reveal facts which would constitute a bar to divorce. A divorce could be obtained collusively on false or partial evidence, particularly if the courts were sympathetic to such evasion of the law. For instance, the use made of the grounds of cruelty in the United States, France, Germany and Switzerland turned the strict law of the statute books into an easy divorce law in practice.<sup>1</sup> The omission of the name of the paramour in Scottish divorce suits suggests widespread collusion between the parties to the divorce, and indulgence by the courts. There would be no pressing need to change the statute law if it was

1. Rheinstein. 'Marriage stability'; 104, also 91, 101.

being evaded in practice.

The dispute over the remarriage of divorced adulterers was not peculiar to Scotland. In New York before the law was amended in 1966 adultery was the sole ground for divorce and the guilty party was prohibited from remarrying. This was evaded by resorting to annulment which was comparatively easy to obtain in the courts. In New England statutory grounds for divorce were adultery, impotence and desertion (usually for five years) as in Scotland, and others which are more strictly grounds for annulment (eg. existing marriage, fraudulent contract). Usually the innocent party was permitted to remarry. Originally in Sweden the guilty party's marriage continued until the death of his former spouse, though the government or the cathedral chapter of the diocese could grant a dispensation to remarry. This permission came to be regarded as a matter of course in the nineteenth century - prohibition of remarriage had to be expressly stated in the dispensation for divorce.<sup>1</sup> The occurrence of this bar on remarriage in several societies which legally recognised divorce suggests that it was related to a structural feature in traditional society, and not to some peculiarly Scottish phenomenon. A parallel is the restrictions on rights to property of a widow. There is the overriding concern that the heirs of the first marriage should enjoy their rights without hindrance from the widow or the children of subsequent marriages.

It might be thought that the introduction of divorce in Scotland detracted from the stability of marriage. However,

<sup>1</sup> Rheinstein. 'Marriage stability'; 91, 32, 134.

Rheinstein emphasises that divorce is a legal procedure which does no more than ascertain the fact that a marriage has broken down and restores one or both parties to the freedom of entering into new relationships that will be recognised as legally effective, and thus socially respectable, marriages. Divorce is a solution to, rather than a cause of, the disruption of marital relationships.<sup>1</sup> Furthermore the number of divorces is likely to be small. The number of divorce cases brought in Scotland between 1898 and 1908 varied between 151 and 223 per year: this was over thirty years after the procedures had been made simpler for divorces on grounds of desertion.<sup>2</sup> In New England the 'divorce rate' may have been higher: in Plymouth Colony at least 6 divorces were granted between 1661 and 1692, and between 1760 and 1786 the number of cases brought before the governor and council was 96. In Connecticut it was said in 1788 that no less than 390 divorces had been granted in the preceding fifty years. However, this probably included cases which are strictly for annulment rather than divorce, and the figures are so raw that any comparison is likely to be misleading.<sup>3</sup> The English data is more revealing. Until 1858 only the king in Parliament (as head of both the state and the church) could dissolve marriages as a special privilege. Although Parliamentary divorce became a regular practice, it was an expensive and cumbersome procedure available only to the most affluent. Only 5 divorces were granted between the enactment of the first such bill in 1669 and 1715. Between 1715 and 1850 the number was 224,

1 Rheinstein. 'Marriage stability'; 5.

2 Guthrie. 'Divorce'; 47.

3 Rheinstein. 'Marriage stability'; 32-33.

with most at the end of the period - the yearly average was 2.2 between 1801 and 1850.<sup>1</sup> This suggests that the frequency of divorce depended primarily on the ease of obtaining a divorce - if the legal procedures were too cumbersome other ways would be found, eg. cohabitation, moving to a new district. These alternative solutions were more likely to be resorted to by the less affluent - they were more anonymous in society (unlike the Earl of Argyll) and had less to gain by maintaining their first marriage or by obtaining a lawful second marriage. The frequency of divorce reflects the legal procedures and the benefits of obtaining a divorce rather than the incidence of marital breakdowns.

The contribution of the Reformers was to increase the legal stability of marriage by reforming the system of impediments and dispensations. This was a major contribution to the stability of society. In 1693 an Act was read for the transfer of commissary jurisdiction in matters of divorce and validity of marriage to the Court of Session, and it was argued that

"these matters are not only of great consequence and import, but if we either reckon the varieties of cases and circumstances, by different laws and constitutions of most nations of the world, the different of opinions of both lawers and divines, anent these matters, and the great number of volumes that is written thereupon, the many subtitities and intricacies therein contained, it may be justly thought, that the most qualified Judges, and the greatest lawers are hardly sufficient to determine these matters, and consequently, the Lords of Session ought to be the only Judges

<sup>1</sup> Rheinstein. 'Marriage stability'; 31.

privative thereto, or that the same may be remit to an assembly of divines, who ought to be well versed in such questions, as it was at the beginning of our Reformation."<sup>1</sup>

The issues were of such importance that they were worthy of the best lawyers or the most knowledgeable divines. The contraction or ending of a marriage was one of the key-stones to society, particularly as it affected the disposition of property. Land meant wealth, status, rights and obligations, and all these relationships within society would need to be reorganised if someone was divorced, or a marriage annulled. It is therefore apt that failure to meet the basic obligations of marriage to the degree that a divorce resulted was punished by depriving the guilty party of his rights to property by marriage. The grounds for divorce reveal two of the basic duties of husband and wife - cohabitation and sexual monogamy.

1 'A.P.S.'; IX, 45; app., 87-88.



## 7. INCEST.

### 7.1. Introduction.

The Canon Law and the Reformers meant different things when they spoke of incest. To the Reformers incest included any sexual or marital liason which was forbidden because of kinship. The same definitions were used for incestuous intercourse and incestuous marriage. William Hay in contrast speaks of the impediments of 'incest', public propriety and the forbidden degrees. Incest is discussed only in relation to impediments to marriage and not in terms of intercourse outside of marriage. His different perspective may be a reflection of the theme of his 'Lectures' - marriage. 'Incest' meant to Hay the impedient impediment whereby intercourse (after marriage) with a relative of the wife created a kinship relationship which barred the husband from having intercourse with his wife, or marrying the relative after his marriage had ended.<sup>1</sup> The diriment impediment of public propriety arose from a valid betrothal without subsequent intercourse, or intercourse with any woman with conjugal intent. Intercourse after a valid betrothal came under the diriment impediment of affinity.<sup>2</sup> These two impediments used the same forbidden degrees as that for the diriment impediment of consanguinity and affinity. 'Kinship' was created by intercourse as well as marriage. The Scottish Church accepted the fourth Lateran Council's revision of the forbidden degrees to four in Canon 65 of its Provincial Council at Perth in 1242.<sup>3</sup>

An important part of the Canon Law was the power of the Pope to grant dispensations to people for marriage in the second, third and fourth

1 Hay. 'Lectures'; 47.

2 Hay. 'Lectures'; 57, 211, 213.

3 Boyd. 'Theological Presuppositions'; 492.

degrees as these were not prohibited by divine nor natural law.

This system of dispensation was abused. The issuing of dispensations without apparently any difficulty other than cost compromised the idea that relationships in the third and fourth degrees were impediments to be taken seriously. There are several examples, for instance, of instruments which gave commission to individuals to grant several dispensations. One engrossed in the text of an action before the Kirk Session of St. Andrews authorised John Thorntoun to grant dispensations to forty-five couples, and the dispensation involved in the case was number thirty-nine, although issued only eleven months after the commission was sealed at Rome.<sup>1</sup>

The forbidden degrees also played a prominent role in the suits recorded in the 'Liber Officialis' - over half the cases were suits for nullity on the grounds of consanguinity or affinity (3.4.3. above). It is not, therefore, <sup>r</sup>surprising that Seton, in an article on marriage in the fifteenth and sixteenth centuries, concluded that the greater and lesser nobility deliberately exploited the Canon Law, even when the impediment was known at the time of the marriage. The result was that "in many families at least, divorce of successive wives became almost a family habit - each divorce synchronising with an actual or prospective change of government or political conditions".<sup>2</sup>

The Catholic Church recognised the existence of abuses, and action to curb them was taken by the Council of Trent in 1563. The grounds on which dispensations could be granted were clarified,

<sup>1</sup> 'K.S.Reg.St.Ands (1)'; 115-116, fn 2.

<sup>2</sup> Seton. 'Distaff Side'; 274.

and the distinction emphasised between couples who had contracted marriage knowing of the impediment, and couples who had married in good faith. Dispensations were not to be granted for marriages to be contracted, or at least very rarely. The impediment in the second degree would be dispensed in future only for "great princes and for a public cause". But reform did not extend to a change in the number of prohibited degrees. The Council of Trent declared it anathema to say that the degrees should be restricted to those set down in Leviticus, or that the Church "cannot dispense in some of those degrees, or establish others that may hinder and dissolve it (matrimony)". There were, however, some changes. Affinity which arose from fornication was limited to the first and second degrees, and the impediment of public propriety was restricted to the first degree and only arose from a valid betrothal "forasmuch as any such prohibition can no longer be observed, without injury, in more remote degrees".<sup>1</sup>

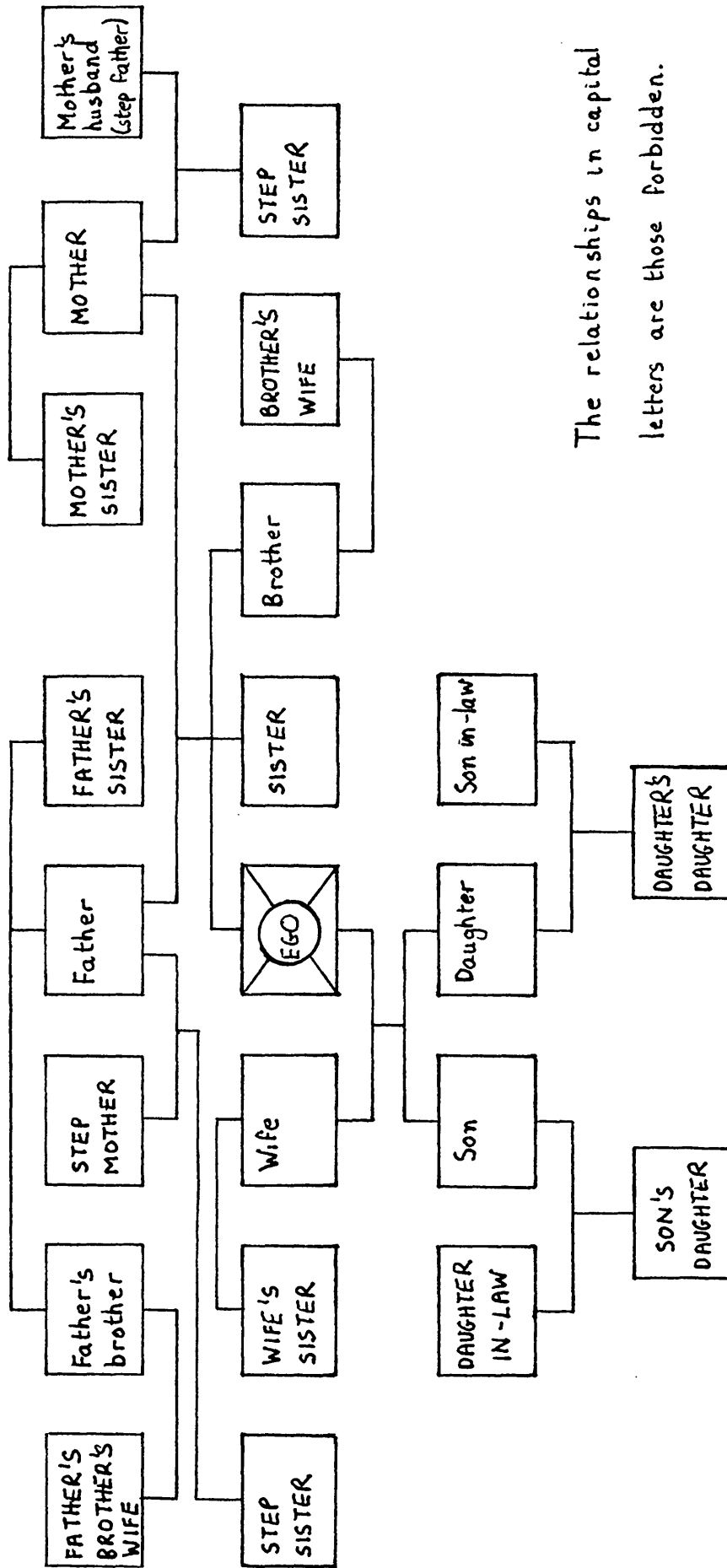
## 7.2. The Reformation settlement and later developments.

### 7.2.1. The Reformation settlement.

Before considering the actions of the Reformers, it is useful to consider exactly which relationships were specified in Leviticus 18. This chapter was the core of all forbidden degrees, both in Canon Law and the Reformation settlement. Verse 6 says "None of you shall approach to any that is near of kin to him, to uncover their nakedness". Verses 7 to 18 include the following relationships: mother, father's wife, sister, daughter of a father or mother

<sup>1</sup> 'Trent Canons'; 194, 200-201.

Fig. 7. Forbidden degrees according to Leviticus XVIII, vs. 7 to 18.



The relationships in capital letters are those forbidden.

(step-sister), son's daughter or daughter's daughter (grand-daughter), father's wife's daughter, father's sister, mother's sister, father's brother's wife, daughter-in-law, brother's wife, a woman and her daughter, woman's son's daughter or daughter's daughter, and wife's sister. Marriage is not mentioned - the phrase is 'uncover her nakedness' and this was interpreted to forbid both intercourse and marriage with the kin listed. The relationships can probably be better understood by using a kinship diagram (fig 7). Excluded from the diagram are the woman and her daughter or son's daughter or daughter's daughter. The diagram reveals that the kin are a mixture of the first and second degrees of affinity and consanguinity. The structure is not inclusive, for instance, the omission of daughter. The second degrees omitted are maternal/paternal aunt (great aunt), maternal/paternal aunt's daughter, brother's/sister's daughter (niece), grand-mother and brother's wife. It was on this foundation that the Reformers constructed a new framework for incest.

The question of incestuous marriages was dealt with at a very early date in the Reformation. On 21 December 1560 the General Assembly agreed that:

"The question being proponed anent mariage in second and uther degries of consanguinitie, forbidden be the Pope to be solemnizat betwixt parties, it is found that, of the law of God, mariage may be solemnizat betwixt parties beand of second, thrid, and ferd degries of affinitie or consanguinitie, and uthers sick as are not prohibited expressely be the word of God; and therfor to desire the Lords and estates to interpone there authoritie, and approve the samein, and make lawes therupon"<sup>1</sup>.

<sup>1</sup> 'B.U.K.'; I, 5.

The positive wording shows that the Reformers were more interested in which marriages were permitted rather than those which were forbidden. By implication marriage within the first degree, eg. daughter, were forbidden. No mention is made of simple incest, that is, incest by intercourse alone and not incest by marriage. Parliament acted with less haste and an Act anent incestuous marriages was not passed until 1567. The timing of the act of the Assembly suggests that there was considerable agreement within the General Assembly so that no time was wasted in debating the issues. There may also have been an awareness of the pressing need for reform because of the widespread abuse of the existing law in the granting of dispensations and annulments. Furthermore incest involved two of the main principles of the Reformation - emphasis on the word of God and the rejection of Papal authority. It was only four months after the abolition of Papal authority in August by Parliament that the General Assembly passed their act anent incestuous marriages.

Only five years elapsed before the General Assembly made additions to the forbidden degrees mentioned in Leviticus. It is possible that the act of 1560 was worded to include all degrees on which there was unanimity, and that the urgent need for an act did not allow discussion to take place until later of some relationships which some felt should also be forbidden. The Assembly dealt with two relationships: wife's brother's daughter or wife's sister's daughter; and father's brother's daughter and sister's and brother's children. In December 1565 it was asked if a man might marry his wife's brother's/sister's daughter. The Assembly

"votit and found be the word of God, that none may marie his wifes brother or sister daughter, and if any such mariages was contracted, the samein to be null and aught not to stand".<sup>1</sup>

The Kirk Session of St. Andrews dealt with a marriage of a man with his first wife's sister's daughter in June 1586. The man refused to recognise the marriage as incestuous and was ordered to appear before the Synod who ordered them to separate. The man made a supplication to the Commissary Court and it was not until September 1587 that the couple confessed their sin and separated from each other's company.<sup>2</sup> The degree is listed as forbidden in the table of the Act of Parliament in 1649, and a case occurs in the Privy Council records of 1689. Three further cases are mentioned in the records of the Synod of Angus and Mearns in 1703, Presbytery of Lanark in 1711, and the Commission of the General Assembly in 1713.<sup>3</sup>

The other relationship had arisen in the previous Assembly in June 1565. The question had probably been referred by the Kirk Session of St. Andrews as in November 1564 they had considered a proposed marriage with this relationship. Janet Monat had confessed that she had become pregnant by John Scot, after a promise of marriage made without witnesses. The couple were "sister and brether barnis" and Janet now wished to marry John. The Session ordered them to make public satisfaction and to abstain from each other's company until

"sic tim as thar caus and desir of maruaigne be oppinnit and discussed in the Generall Essemble of the Kirk, in December nixt to cum".<sup>4</sup>

1 'B.U.K.'; I, 72.

2 'K.S.Reg.St.Ands' (1); 561, 566-567, 577, 580, 592.

3 'A.P.S.'; VI, pt I, 476. 'R.P.C.'; XIV<sup>3</sup>, 424. Graham. 'Ecc. Disc.'; 169, 170.

4 'K.S.Reg.St.Ands' (1); 228.

The details do not exactly tally with the case mentioned in the question considered by the Assembly in June of the following year. This concerned a man who wished to marry his father's brother's daughter whom he had abused for seven years and begotten children. The answer is remarkable for several reasons and is worth quoting in full:

"Th<sup>o</sup>ugh this be not found contrair to the Word of God, yet because it hes bein publicklye reveilit in this realme, and that diverse inconvenients are perceivit to enseu of this liberty; thinks it good, that it be offered to the civill magistrate, or els to ane parliament, for ordour to be taken therein; in the mean time, that men take not libertie to themselves according to there fleschly filthie affectiouns; notheless that the persones, in whose name this question was proponit, be joint in marriage after there public repentance for the offences bygane, without any hope that uthers have the like licence, whill farther ordour be tane be the civil magistrat, as said is."<sup>1</sup>

This amounts to a temporary ban on marriages in this relationship until the civil magistrates made a decision. The Assembly is drawing a distinction between degrees forbidden by divine/natural law and those forbidden by man-made laws. This is a surprising return to a distinction similar to that of medieval Canon Law, and the Assembly's action is almost equivalent to issuing a dispensation for this particular couple. The Assembly emphasises, however, that this permission is a unique exception until the State decides if this degree should be forbidden. This referral to the civil magistrate

<sup>1</sup> 'B.U.K.'; I, 62.



pre-dates the similar request for a decision on the remarriage of adulterers. The Assembly was in a quandary: the relationship of father's brother's daughter was a relationship of the second degree of consanguinity, yet the idea of such a marriage was said to be repugnant to society. It is a pity that the Assembly is not more specific about the many inconveniences - especially as this relationship does not appear to have been forbidden by the Acts of Parliament of 1567 and 1649, and no other cases of this relationship have been traced other than that of 1566 mentioned below.

It is possible to at least guess what one of these inconveniences may have been. A clue is given by Homans' study of English villagers in the thirteenth century, in particular the customs of wardship. In Kent the wardship of the heir usually went to the nearest kinsman of the heir on the mother's side, ie. mother's brother or sister. The English lawyers rationalised this by material interests - the wardship ought to belong to the nearest of kin of whom the inheritance could not descend, the nearest of kin who would have nothing to gain by the death of the heir.<sup>1</sup> Applied to the forbidden degrees, it could be argued that an inconvenience was that a tutor or guardian could use his position of trust to benefit his family by the marriage of a son or daughter to the heir at the expense of the heir and the rest of the family. The risk of this could be lessened by such a marriage being forbidden as incestuous. The problem with this argument is that marriage to a father's brother's daughter does not appear to have been a forbidden relationship after 1567. It is possible that the

<sup>1</sup> Homans. 'Eng Villagers'; 191-192.

advantages of cross-cousin marriage - the preservation of the family estate - was of more importance than the disadvantages: the interests of the heir was of lesser importance than the interests of the family as a whole.

It is not known if the General Assembly referred the issue of father's brother's daughter to the civil authorities in June 1565. However, in December 1566 a man<sup>was</sup> married to his father's brother's daughter in the Chapel Royal despite being forbidden to do so by the Church. The Assembly was asked what should be done, and it was ordained that the couple should be delated to the Justice Clerk and the kirk so that they could be punished.<sup>1</sup>

It is possible that the Act of Parliament of 1567 was passed to resolve this dispute over marriage with father's brother's daughter, and thus be an instance where an enactment was made because of the issues raised by specific cases. The Assembly's decision of June 1565 was controversial because it extended the forbidden degrees beyond those of Leviticus, and went against the Reformers' insistence on the Word of God in their act of 1560. The effect of the Act of 1567, however, was to give the authority of the State to the Assembly's act of seven years earlier, and to overturn the decision of 1565.

Parliament in 1567 passed Acts anent incestuous marriages and the penalty for incest. The first was entitled 'Anent lauchful mariage of the awin blude, in degreis not forbidden be Goddis worde'. The preamble does not give any reason why the Act was passed at

1 'B.U.K.': I, 91.

this particular time and is restricted to a statement of principle -- the bond of marriage is as lawful and as free as the Law of God permits. The enabling part of the statute falls into two parts. The first declares which of the formerly forbidden degrees can now marry:

"that secundis in degreis of consanguinitie, and affinitie, and all degreis outwith the samin, contenit in the word of the eternall God, and that ar not repugnant to the said word, micht, and may lawchfullie marie at all times, sen the viii day of Marche, the year of God ane thousand, five hundreth, fiftie aucht yeiris (ie. 1559), notwithstanding ony Law, statute, or constitutionis maid in the contrare".<sup>1</sup>

The Act is phrased in the same manner as the General Assembly's act of 1560: it states which degrees can marry, rather than those which cannot. The cancellation of any contrary laws may be specifically directed at the Assembly's act of 1565. The significance of the date 6 March 1559 is not known. This date had been used by the Privy Council in 1561 when the clergy were forbidden to apply to Rome for confirmation of feus granted since 6 March 1559. It appears that this date was used by contemporaries as the start of the Reformation although why it was chosen is not known. Donaldson has suggested it may have marked the cessation of war between England and Scotland.<sup>2</sup> The second enabling part of the Act declares valid all such marriages made since then and declares the legitimacy of children from these marriages and their ability to inherit. It is

1 'A.P.S.'; III, 26.

2 'R.P.C.'; I<sup>1</sup>, 162-163. Donaldson. 'Scotland'; 92, 144-145.

possible that this was the main point of the Act - perhaps there had been a lawsuit over inheritance where it had been argued that the heir from such a marriage could only inherit if the marriage had taken place after and not before the Assembly's act of 1560. Some sort of initial date was needed to prevent suits over cases of inheritance which had been settled previously under Canon Law, fifteen, twenty or more years before.

The second Act of 1567 was 'anent thame that committis incest' and made death the civil penalty for incest. There is some doubt as to whether the Act was innovatory or merely declaratory. Fraser thought that previously the only punishment under common law was ecclesiastical penance.<sup>1</sup> No definite evidence has been found to prove either case, although it does seem likely that the Act was innovatory, like that of 1563 anent adultery. For instance, in the cases of incest before St. Andrews Kirk Session in 1564, 1565 and 1566, there is no mention of the offenders being delated to the magistrates, although in one case the couple were fined ten shillings for the poor. However, in 1569 and 1573 both couples were committed to the magistrates for punishment.<sup>2</sup> Secondly, the preamble of the Act presents its measures as innovatory by its phrasing and by the inclusion of the reasons why it was necessary:

"Forsamekle as the abhominabill, vile, and filthie lust of incest, is sua abhominabill in the presence of God, and that the samin eternall God be his expres word hes contempnit the samin, and yit nottheles the said vice is sua usit within this Realme, and the word of God is in sic sort contempnit, be the usaris thairōf,

1 Fraser. 'Husband and Wife'; I, 113. Maisch. 'Incest'; 228.

2 'K.S.Reg.St.Ands' (1); 192-193; 233; 283; 315; 374-375, 377.

that God be his just judgementis hes occasioun to plague the Realme, quhair the said vice is committit, (without God of his mercy be mair gracious, and remeid be providit, that the said vice ceis in time cuming). Thairfoir ..."<sup>1</sup>

Against this must be set the Privy Council's instruction to the justice clerk in 1564 to set particular diets to try people delated for incest. They would hardly have done this unless there were civil punishments, even if these did not include death.<sup>2</sup> The preamble also demonstrates the official attitude of horror and loathing for incest, and the belief that if the offenders went unpunished God would punish the whole land with famine, bad weather, epidemics, etc.

The Act ordained that

"quhatsumever persoun, or personis, committeris of the said abhominabill crime of incest, that is to say, quhatsumever person, or personis thay be that abusis thair body with sic personis in degre, as Goddis word hes expreslie forbiddin, in ony time cuming, as is contenit in the XVIII Cheptour of Leviticus, salbe puneist to the deith."<sup>3</sup>

It is interesting that the Act defines incest and in different terms to the Act anent incestuous marriages. It refers specifically to abusers of their bodies. The cases seen do not provide sufficient information to show that this was interpreted to mean that intercourse was needed for people who married incestuously to be punished with death. There was also a potential loop-hole in that the relationship had to be expressly forbidden by Leviticus - some of the relationships within the forbidden degrees were not named in Leviticus, eg. daughter and niece.

<sup>1</sup> 'A.P.S.'; III, 26.

<sup>2</sup> 'R.P.C.'; I, 298.

<sup>3</sup> 'A.P.S.'; III, 26.

No changes were made by statute until 1649, and the General Assembly considered incest only twice more and on neither occasion were any innovations made. On the first occasion in 1570 no impediment to marriage was found when it was asked:

"Two men haveing lyen with two sisters, If any of them may marrie the daughter of the other man begotten upon another woman, and not upon any of the two sisters beforementioned."<sup>1</sup>

This was equivalent to the wife's sister's husband's daughter. The second question is more interesting, partly because its meaning is unclear. In 1575 the Assembly was asked:

"Q. A woman hath committed incest with her mother's husband, and hath satisfied the Kirk therefor; and now the said woman desires to be married to another man, with whom she has committed fornication, What shall the minister doe in this case. A. Let this be formed better, and this to be moved to the Regent."<sup>2</sup>

It is possible that there was doubt as to whether a person convicted of incest had the right to marry. Perhaps someone had suggested that there was a parallel with adultery - the offender had forfeited their life under God's law, and should be treated as if they were dead, although their lives had been foolishly spared by the civil courts. However, this argument was applied in the context of divorce for adultery and the adulterer's remarriage. This did not apply to incest where an incestuous marriage was null except in so far as the incest had also been adulterous. There is no way of knowing exactly what was meant as no trace can be found of this question being reworded or asked of the Regent.

1 'B.U.K.'; I, 171-172.

2 'B.U.K.'; I, 345.

### 7.2.2. The legislation of 1649.

Incest is notable in the seventeenth century for the fact that no permanent changes were made to the statutes of 1567. There was some legislation passed in the 1640's, but it was rescinded at the Restoration. This legislation is important for two main reasons: the schedule annexed to the Act lists the forbidden degrees, and the surviving records show the way the legislation was evolved under pressure from the Commission of the General Assembly and how its progress reflected the changing political situation.

In 1644 the Commission of the General Assembly made an overture to Parliament "Anent the putting of the Actes of parliament against Adulterers and incestuous persons to executione". It is not known exactly what the Commissioners suggested as the text of the overture has not been traced. It does, however, look as though the Commission believed that the Act of 1567 was not being applied in all its rigour, either by incestuous persons evading prosecution or by more lenient penalties. The reaction of Parliament was lukewarm and no measures were taken to ensure the Act's execution. Instead the overture was remitted

"To the Justice Deputes To be thought upoun and considdered be them And if there be any thing in the present Actes to be cleered theranent Ordeanes the Justice Deputes to present their Judg<sup>m</sup>entes for that effect to the next Sessioun of parliament That the samene may be tane in consideratioun And course tane theranent be the parliament"<sup>1</sup>

<sup>1</sup> 'A.P.S.'; VI, pt I, 199.

The phrasing suggests that Parliament did not expect to make any innovations, but only to clarify the Acts of 1567. It is possible that one of the problems of enforcement was knowing precisely which relationships in the second degree were forbidden. Certainly the desire for greater clarity was not new as the Canons of 1636 included the recommendation that a list should be published for all to see:

"And for the better information of all sorts, touching the degrees prohibited, it is expedient that a table be affixed publicly in every parish church"<sup>1</sup>

There is no record of any further action being taken or of any report being made to Parliament by the Justice Deputes. This may be due to a lacunae in the sources as there are no traces of any further overtures from the Commissions to Parliament until 1646. In that year the Commission of the General Assembly proposed to Parliament

"That your Lords according to the frequent desires of this kirk tendered to everie parliament and almost everie session of parliament Wald be at lenth pleased to considder the acts of formar parliaments against adulterie and incest That they may be in suche revived and renewed as these odious sins yit so ryife and growne to suche a hight of abominatioune as is horride to express May be restrained and exemplaire punished And when these Lawis ar so established That some course may be provided how the ordinarie judges may be authorized and enabled for executing of them in all the pairtis of the kingdome".<sup>2</sup>

<sup>1</sup> Laud. 'Works'; V, 594.

<sup>2</sup> 'A.P.S.'; VI, pt.I, 552.



The overture makes it clear that the Commissions had made other overtures since 1644 and that these had been unsuccessful. The tone of the overture is definitely one of exasperation and impatience. The Commissioners believed that incest (and adultery) had increased to the extent that it was common-place because the Act of 1567 was not being applied and needed to be revived. The emphasis in this overture is on ways of enforcing existing law throughout the country: Parliament's reaction was limited to ratifying on 2 February 1646 the former acts, presumably both Acts of 1567. It did not, as was suggested, take measures to ensure their execution.<sup>1</sup>

It is, therefore, not surprising that a year later the General Assembly once again made an overture to Parliament for the restraint and punishment of incest. Other overtures included bigamy, adultery, charming, concealing of pregnancies and abortion. Parliament was still thinking along the lines of 1644, although this time the terms of reference for the 'committee' were much wider and more in line with the Commissioners' overture of 1646. Parliament on 18 March 1647 ordained that

"the justice generall and mr James Robertoune and mr Alexander Colvill justice deputtes To consider thir overtors and the offences thereinmentioned incest, bigamy, adultery, etc. In thair severall kindis and degries And what is to be done be the parliament for the strict restraint and condigne punishment of these offences and to report their judgement theranent to the nixt session of parliament That the parliament have the better

<sup>1</sup> 'A.P.S.'; VI, pt.I, 553.

information how to proceed to the enacting new Lawis for executing justice upon suche offenders".<sup>1</sup>

As in 1644 no such report has been traced and no legislation anent incest was passed in the next Parliament. The General Assembly and its Commissioners appeared to have been outmanoeuvred by delaying tactics. This suggests that there was opposition to stricter enforcement rather than just inertia within the system. The sources used give no clue as to why some people did not share the Assembly's sense of revulsion against the abominable crime of incest.

No further developments appear to have taken place until nearly two years later, when the Commissioners of the General Assembly took the initiative by appointing their own committee. On 19 January 1649 the Commission

"understanding that the Comittee of Parliament appointed for the Overtures thinke it necessary before a perfect Act can be past in Parliament for punishing of incest by death, according to the Law of God, that the degrees of incest were cleared; And for this effect the Comission appoints Mr John Smith to draw a table of the forbidden and unlawfull degrees of consanguinity and affinitie for marriage, and to report to the Comision".<sup>2</sup>

The Parliamentary Committee had tried to evade the issue by using the same excuse as that of 1644 and 1647 - if the justice deputes had met, they had apparently been unable to decide exactly which relationships were incestuous. It is possible that there were differences between the relationships defined by civil lawyers as incestuous and those defined by the Church. Certainly it

1 'A.P.S.'; VI, pt.I, 763.

2 'G.A.Commissions'; II, 178.

only took days for Mr Smith to draft a table of forbidden degrees as on the 24 January the Commission appointed Mr James Hamilton and Mr John Smith to revise the table containing the degrees of incest, and to report.<sup>1</sup> Further progress was not so fast and the delay appears to have been again on the part of Parliament. On the 14 March the Clerk to the Commission reported that the Act anent incest was continued until the next session of Parliament.<sup>2</sup> Two days later Parliament granted authority to the Committee of Estates, or a number of their members appointed by themselves, to confer with the Commissioners of the General Assembly about the Act anent incest "And thairefter gives power to the said Committee of Estates to caus publish the same".<sup>3</sup>

After some months some agreement was apparently reached as on 7 June the Commission of the General Assembly appointed the Ministers of Edinburgh and any other members of the Commission to present the Act anent incest with the table of degrees to Parliament. The Act and table were finally passed by Parliament on 9 July 1649.<sup>4</sup> The Commission of the Assembly in January 1650 ordered that the table of degrees should be printed and distributed to presbyteries - it had taken fourteen years to implement the recommendation of the Canons of 1636.<sup>5</sup>

The Act of Parliament was entitled an 'Act for punishing the horrible crime of incest with death'. The preamble states that the purpose of the Act was to provide a sufficient remedy against all degrees of incest so as to prevent the wrath of God falling

1 'G.A.Commissions'; II, 180.

2 'G.A.Commissions'; II, 241.

3 'A.P.S.': VI, pt. II, 363-364.

4 'G.A.Commissions'; II, 289.

5 'G.A.Commissions'; II, 352.

on the land as a punishment for allowing such abominable crimes to go unpunished. The Act of 1567 needed amendment as it only provided the death penalty for those relationships expressly forbidden in Leviticus XVIII whereas

"there may be many other degrees of Incest both in affinity and consanguinity, no less hainous and punishable then these expressed in the Letter of the Text, because they be either neerer or fully as neer".

This suggests that the law had been interpreted strictly and that many of the forbidden degrees had not been liable to capital punishment. This had not been the intention behind the original Act - both Parliament and the General Assembly probably meant that Leviticus XVIII was to be interpreted as a list of examples. The two different ways of interpretation probably explains why the drafting of a table of degrees to which the Act of 1567 applied had taken so long. The Act of 1649 resolved this in favour of the Church's method of interpretation and made a compromise with the lawyers by specifically listing incestuous relationships and recognising that the Act of 1567 referred only to the relationships named in Leviticus XVIII. Thus this Act also marks a definition of responsibilities as it recognised that it was the secular Courts that decided how an Act of Parliament was to be interpreted and not the General Assembly. The Act ratified and approved the Act of 1567 and declared and ordained that

"not only those persons who are guilty of any degree of Incest, exprest in the foresaid Text: But also that whatsoever person or persons shall hereafter be found guilty of any other degree of

Incest either neerer or fully as neer in affinity or consanguinity, as these that are expressed in the Letter of the foresaid Text, shall be punished to the death".

So that these relationships may be better known, a table of the degrees followed the enactment.<sup>1</sup>

The table of degrees is particularly important as it is the only record in the sources examined which specifies exactly which relationships were regarded as incestuous after 1560. The list of 57 relationships is divided into nine categories according to whether they are ascending or descending, lateral or direct, and by their degree. The list is partially reproduced in table 4.

The seven items of information given for each relationship are:

- a. reference to the appropriate verse in Leviticus XVIII except for wife's mother or husband's father which cites Leviticus XX, 14;
- b. whether the relationship is expressly forbidden (15 times) or by analogy (42);
- c. whether the relationship is of consanguinity (19) or of affinity (38);
- d. Latin name of the relationship forbidden for a man;
- e. Scots name of the relationship for a man;
- f. Scots name of the relationship for a woman;
- g. Latin name of the relationship for a woman.

Table 4 shows only the forbidden relationships for a man and omits the Latin name.

The principle behind the degrees of consanguinity are explained in a footnote to the table in the Act:

<sup>1</sup> 'A.P.S.'; VI, pt.II, 475-476.

"No person may marry or lie with those that are in the direct line ascending or descending; or with a brother or sister of one in the direct line."

Figure 8 shows the degrees of consanguinity, using the same method as the tree of consanguinity used by Hay in his 'Lectures' to assist comparison (see3.5.2).

Fig. 8. Tree of consanguinity after 1560.

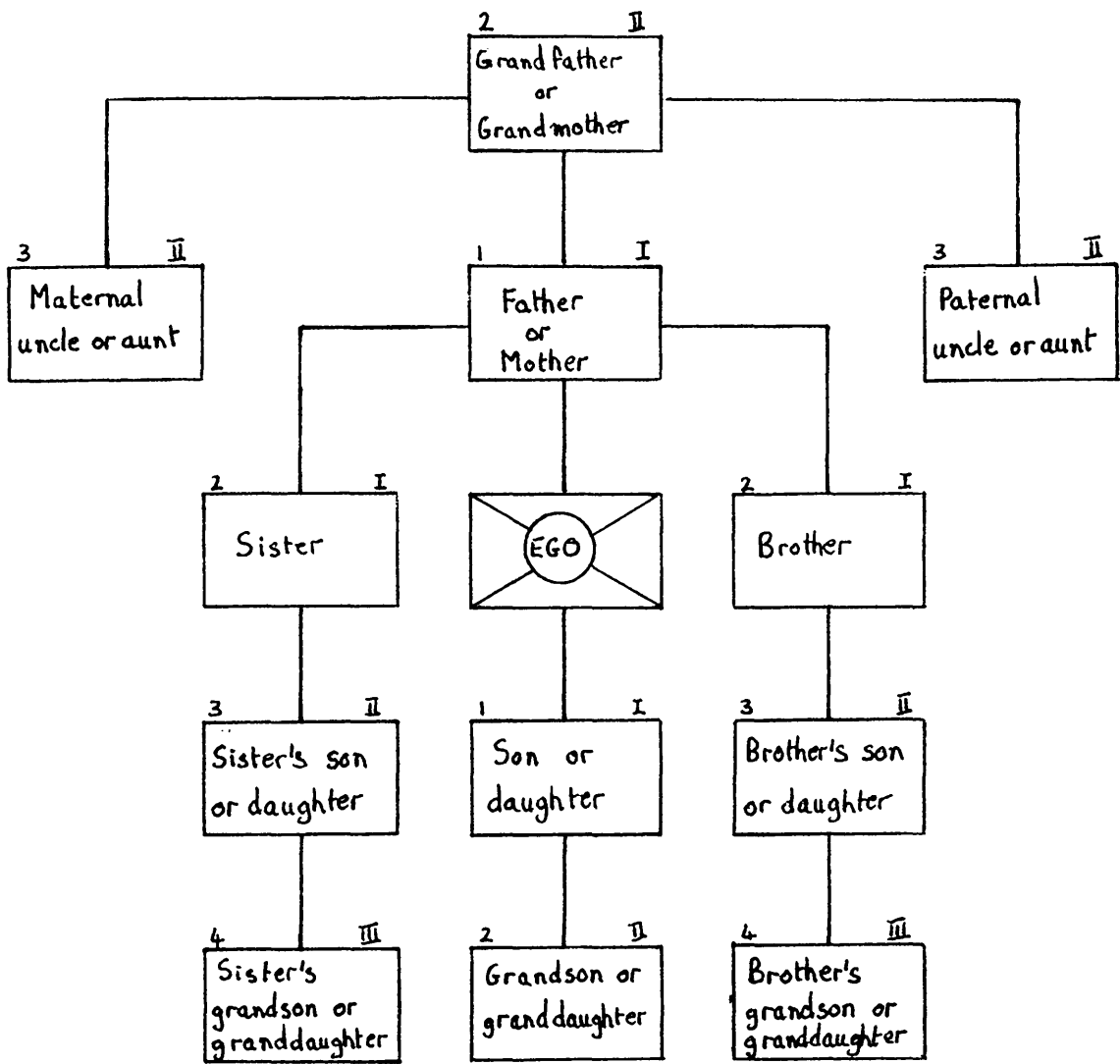


Table 4. Incestuous relationships as defined by the Act of 1649.

Column 1: relevant verse in Leviticus XVIII.

Column 2: whether prohibited expressly (E) or by analogy (A).

Column 3: whether relationship one of consanguinity (C) or of affinity (A).

1	2	3	A man may not lie with her who is his -
12	A	C	Goodsire's (or father's father's) sister
12	A	C	Goodsire's (or mother's father's) sister
13	A	C	Gooddame's (or father's mother's) sister
13	A	C	Gooddame's (or mother's mother's) sister
14	A	A	Goodsire's brother's (or father's father's brother's) wife
14	A	A	Goodsire's brother's (or mother's father's brother's) wife
14	A	A	Gooddame's brother's (or father's mother's brother's) wife
14	A	A	Gooddame's brothers (or mother's mother's brother's) wife
12	A	A	Wife's goodsire's (or father's father's) sister
12	A	A	Wife's goodsire's (or mother's father's) sister
13	A	A	Wife's gooddame's (or father's mother's) sister
13	A	A	Wife's gooddame's (or mother's mother's) sister
10	A	C	Gooddame or father's mother
10	A	C	Gooddame or mother's mother
14	A	A	Goodsire's (father's father's) wife
14	A	A	Goodsire's (mother's father's) wife

15	A	A	Wife's gooddame
15	A	A	Wife's gooddame
12	E	C	Father's sister
13	E	C	Mother's sister
14	E	A	Father's brother's wife
14	A	A	Mother's brother's wife
12	A	A	Wife's father's sister
13	A	A	Wife's mother's sister
7	E	C	Mother
8	E	A	Step-mother
XX)	E	A	Wife's mother
14)			
7	A	C	Daughter
17	E	A	Wife's daughter
15	E	A	Son's wife
9	E	C	Sister by both parents or one alone
18	E	A	Wife's sister
16	E	A	Brother's wife
10	E	C	Son's daughter
10	E	C	Daughter's daughter
15	A	A	Son's son's wife
15	A	A	Daughter's son's wife
17	E	A	Wife's son's daughter
17	E	A	Wife's daughter's daughter



12	A	C	Brother's daughter
13	A	C	Sister's daughter
14	A	A	Brother's son's wife
14	A	A	Sister's son's wife
12)	A	A	Wife's brother's daughter
14)			
13	A	A	Wife's sister's daughter
12	A	C	Brother's daughter's daughter
12	A	C	Brother's son's daughter
13	A	C	Sister's daughter's daughter
13	A	C	Sister's son's daughter
14	A	A	Brother's daughter's son's wife
14	A	A	Brother's son's son's wife
14	A	A	Sister's son's son's wife
14	A	A	Sister's daughter's son's wife
12	A	A	Wife's brother's daughter's daughter
12	A	A	Wife's brother's son's daughter
13	A	A	Wife's sister's daughter's daughter
13	A	A	Wife's sister's son's daughter <sup>1</sup>

1. 'A.P.S.'; VI, pt.II, 476.

This demonstrates the great change at the Reformation; the forbidden degrees were restricted principally to those derived from siblings. The degrees were those of medieval canon law (Roman numerals) and not of the civil lawyers (Arabic numerals), but with many omissions.

The relationships of affinity were calculated in a similar manner. Marriage or intercourse was forbidden with the spouse of a person within the forbidden degrees of consanguinity. The footnote to the table in the Act forbids marriage or intercourse

"with the relicts of those in the direct line; or with the relict of a brother or sister of these in the direct line; though never so far asunder in degree".

The husband and wife are treated as if they were one flesh, the wife bearing the same relationship in affinity to the ego as did her spouse in consanguinity. The same principle was applied to the consanguine relatives of affines: thus, for example, the wife's brother's grand-daughter was in the relationship of the third degree of affinity because the brother's grand-daughter was of the third degree of consanguinity. There was, however, no forbidden relationship between an affine's affines eg. the wife of the brother-in-law (wife's brother's wife).

The kinship terminology in the table uses terms for the immediate family - father, brother, son - in combination to produce terms for more distant kin. Use is not made of terms like grand-aunt, daughter-in-law, niece, or grand-niece. The exception is the use of gooddame for grandmother and goodsire for grandfather. The same kind of terminology appears in incest cases: aunts or uncles

do not appear, though there are a few instances of in-laws and one of oy (grandson).<sup>1</sup> This is similar to the findings of Homans in his work on medieval English villagers and he sees this use of terminology as a reflection of family organisation, and as illustrating the emphasis on the small family group of a man, his wife and their children.<sup>2</sup> This can be qualified for the Act of 1649 by adding the emphasis put on the brother and sister of a man and his wife. Reckoning of kinship by this system is also more precise than generic terms, eg. grandfather can be father's father or mother's father, and allows a distinction to be made between descent through male and female lines. This may explain why father's brother is used in legal documents, while uncle appears in personal writings like letters and diaries. Lastly, this table of forbidden degrees corresponds closely with the kind of kin one could expect by comparison with other western societies to appear as resident kin in a household. The relationships represent links of duties and expectations as well as lines of blood and marriage. It can be suggested as a hypothesis that the vast majority of co-resident kin present in Scottish households would fall within relationships defined as incestuous.

### 7.2.3. The later seventeenth century.

The Act of 1649 anent incest was rescinded at the Restoration along with the other Acts of that period. This is unlikely to have changed the value of the table of 1649 in describing which relationships were defined as incestuous. The effect, however, may

<sup>1</sup> eg. 'Just. Cases'; I, 121-122. 'R.P.C.'; XII<sup>1</sup>, 482; I<sup>2</sup>, 587; II<sup>2</sup>, 317.

<sup>2</sup> Homans. 'Eng.Villagers'; 216.

have been to remove the capital penalty from many of those relationships. The Act of 1567 may have been interpreted as only referring to those relationships cited in Leviticus XVIII, and thus mark a return to the situation which the Act of 1649 had been intended to remedy.

It is difficult to say if this happened as incest is notable for its absence in the sources, except for individual cases, after 1660 as it had been between 1575 and 1644. The proposed Canons for the Church use the same text for incestuous marriages as those of 1636:

"No persons shalbe allowed to marrie within the degrees prohibited by the law of God; and all marriages so contracted and made salbe judged incestuous and unlawfull, and dissolved as void and null from the beginning; and the parties so married shalbe separated by law".<sup>1</sup>

The section in the Confession of Faith, ratified by Parliament in 1690, is similar though it includes some words of explanation relating to affinity:

"Marriage ought not to be within the degrees of consanguinity or affinity forbidden in the Word, nor can such incestuous marriages ever be made lawfull by any law of man, or consent of parties, so as these persons may live together as man and wife. The man may not marry any of his wifes kindred nearer in blood than he may of his own, nor the woman of the husbands kindred nearer in blood than of her own."<sup>2</sup>

One might expect that MacKenzie as King's Advocate might be clearer

1 Lamb. 'Ecc.Rules'; 165. Laud. 'Works'; V, 594.

2 'A.P.S.'; IX, 128. This Confession is the same as the Westminster Confession of 1645.

on this point, but he restricts his comments to the expressions used in the Act of 1567:

"whosoever pollutes his body with such persons in degree, as Gods word doeth contain in the 18 of Leviticus, shall be punished with death".

He only adds that he thinks the death penalty applies to attempted incest ('nudus conatu') as well as actual incest ('copulation'), and that punishment is usually by hanging, though sometimes by beheading.<sup>1</sup> The three examples he cites of execution are curiously all in the 1640's - Barnoch 1641, Knox 1646, and Strang 1649 - although his treatise was not published until 1678. Only Strang was executed for incest within a relationship (brother's daughter) not expressly forbidden in Leviticus, and MacKenzie does not say if this relationship was still punishable by death.

Another possible way of checking is to examine the cases of incest where the offender was executed. Fourteen cases between 1663 and 1690 are mentioned in the published records of the Privy Council, the Justiciary Court (to 1678), and in Lamont's 'Diary'. Most (9) of the Privy Council references do not give details of the punishment, and in four cases the relationship is unknown. Four of the cases involve relationships not mentioned in Leviticus XVIII: these are -

daughter. 1666.<sup>2</sup>

sister's son. 1669.<sup>3</sup>

step-daughter. 1670<sup>4</sup>

wife's sister's daughter. 1689<sup>5</sup>

1 MacKenzie. 'Laws'; 160.

2 'R.P.C.'; II<sup>3</sup>, 201.

3 'R.P.C.'; III<sup>3</sup>, 44-45, 79, 95.

4 'Just. Court'; II, 10-14.

5 'R.P.C.'; XIV<sup>3</sup>, 424.

The outcome of the case is only known in two instances - in the 1669 case the woman was acquitted and assu~~il~~ized by the assize and the man had already been executed for bestiality. The case of 1670 is the infamous Major Thomas Weir trial - a verdict on the accusation of incest with his step-daughter was not returned and he was burnt at the stake for bestiality and incest with his sister.<sup>1</sup> Thus these cases only show that persons were accused of incest in relationships not cited in Leviticus XVIII, and do not show whether or not capital punishment was exclusively the punishment for relationships expressly forbidden in Leviticus.

#### 7.2.4. Summary.

Three events stand out in the history of legislation anent incest in the sixteenth and seventeenth centuries - the act of the General Assembly of 1560, the two Acts of Parliament of 1567, and the Act of Parliament of 1649. All three dates share one political characteristic: they were times when Protestant extremists had the ability to influence the apparatus of national government. The General Assembly of 1560 - if the Convention can be given such a formal title at this early date - was in fact one of the instruments through which the Lords of the Congregation achieved and consolidated their coup d'etat. 1566/1567 was marked by Mary's attempts to secure support for her marriage with Bothwell whom she married on 15 May 1567. This included financial concessions to the Reformed Church at the end of 1566, and its royal recognition in the Parliament which met in April 1567. The passing of the Act in Parliament anent incest marks the nomination of Moray as Regent after Mary's defeat at

<sup>1</sup> For this case see also: Lamont 'Diary', 218; Chambers 'Domestic Annals', II, 332-333.

Carberry Hill. The situation in 1649 was that the Protestant extremists controlled a purged Parliament. The overtures from the Church of 1644, 1646 and 1647 had failed to achieve their object although the Act of 1567 had been ratified by Parliament in February 1646. The overtures had been killed by usually referring them to a committee of justice deputed. The balance of political power, however, radically altered between 1648 and 1649. In the Parliament of 1648 there was a substantial majority for Hamilton and the Engagement - all but ten or eleven nobles, more than half the shire commissioners and nearly half the burgesses, giving a majority of thirty to thirty five votes.<sup>1</sup> The surrender of the Engagers after the Whiggamore Raid resulted in a purge following an undertaking in September 1648 to Cromwell to exclude all Engagers from power. The Act of Classes passed by Parliament on 23 January 1649 was partly the legislative ratification of a process which had been going on for several months.<sup>2</sup> Thus when the Commission of the General Assembly petitioned again in January 1649 there was a greater chance of success as the purged Parliament was the most radical since the troubles began. The balance of power was in their favour as the kirk party and the few remaining nobles could only remain in power by not alienating the ministers.<sup>3</sup> The Act of 1649 can be seen as marking an alliance between a radical Church and a radical Parliament.

The political situation explains how an Act was passed at a particular time, but not why it was considered necessary. The fact that the political situation had to be favourable shows that there

1 Stevenson. 'The Covenanters'; 563. Rubinstein. 'Captain Luckless'; 184, 188.

2 Stevenson. 'The Covenanters'; 600, 610, 619.

3 Stevenson. 'The Covenanters'; 627, 628.

was no consensus that an Act was needed. On all three occasions it was a minority who believed a change was necessary, though this needs to be qualified for 1560.

The forbidden degrees of medieval canon law were abused and to some extent disregarded by the higher social ranks before the Reformation. The many dispensations granted suggest that the forbidden degrees no longer corresponded with the contemporary views of kinship. Although avoidance appears to have been relatively easy, dispensations cost money and time, and there was always the risk that there would be expensive law suits later over inheritance. It is also possible that there were too few potential marriage partners given the large net cast by the third and fourth degrees of affinity and consanguinity, and the practice of marrying someone of similar status, rank and wealth. A third possible explanation of the support for the changes of 1560 may be that there were practical advantages to marrying within the fourth degree. The number of dispensations supports this view. Marriages outside the forbidden degrees could bring new and advantageous social and political ties reinforced by kinship, and could bring property as well. On the other hand, cross-cousin marriage would retain wealth and power within a 'family' rather than dissipate it, and this concentration could be advantageous in a period of social change and political uncertainty. It is clear that by 1560 the kinship recognised in the third and fourth degrees must have been weak enough for people to contemplate such marriages without a strong sense of impropriety, and without feelings of sexual abhorrence.

The needs in 1567 and 1649 were fundamentally different as they were narrower in scope, dealing only with the question of the



civil punishment of people convicted of incest. In 1567 there was the need to bring the law of Scotland into line with the law of God by making incest a capital offence. It does look as if the Act of 1567 was worded carefully to give as little away as possible with the result that in the 1640's there were concerted efforts to change the interpretation of the Act. Initially the Church appears to have argued that the Act of 1567 made all kinds of incest punishable by death, and not just those expressly mentioned in Leviticus XVIII. Between 1646 and 1649, however, the Church recognised that it was the Act which needed amending rather than improvements in its application.

There is also a third way of asking the question why - why have any laws or customs against incest. This will be considered after some further material has been examined on problems of interpretation and on the application of the law.

The importance of the changes in the law of incest in 1567 can be seen in the length of time it lasted without alteration. For nearly 300 years the settlement of 1567 was the law anent incest, so at least its application could not have conflicted with the structural characteristics of society. The attempts to change it were at first relatively minor and unsuccessful. In 1847 the British Parliament was petitioned to liberalise the law by allowing marriage with the deceased wife's sister. Further attempts were made in 1849, 1850, 1855 and 1859. This bill became an annual event until it was finally passed in 1907. It was accepted by the Church of Scotland in 1910. A further minor change was made in 1921 by the Deceased Brother's Widow's Act. Substantial changes, however, were not made until 1931 when marriage was permitted with uncle's widow,

deceased wife's aunt, nephew's widow, and deceased wife's niece. All these relationships were in the third degree of affinity. The law took cognizance of changes in the divorce law in 1960 by permitting marriage after divorce with any person as if that former spouse were dead. The Sexual Offences Act of 1956 made incest punishable by imprisonment not exceeding seven years.<sup>1</sup> This rapid review of the changes emphasises the lasting nature of the Acts of 1567 anent incest, and to show that changes were to the degrees of affinity and not of consanguinity. As the importance of kinship in society has changed so have the laws on incest, and this suggests that the ties of kinship recognised in 1567 were of importance until the 1900s.

### 7.3. Problems of interpretation.

#### 7.3.1. The extension of the forbidden degrees.

The act of the General Assembly of 1560 anent incestuous marriages and the Act of Parliament anent the punishment of incest of 1567 referred to only those relationships expressly forbidden in Leviticus XVIII. As has been seen, there was some doubt in the 1640's whether the Act of 1567 applied to relationships not named in Leviticus. The Act of Parliament of 1649 accepted that the Act of 1567 only applied to relationships named in Leviticus. The dispute was about two different ways of interpreting 'expressly'. The first was narrow and legalistic: expressly meant that the relationship was specifically named in Leviticus. The second interpretation of 'expressly' sees verse 6 as a statement of

<sup>1</sup> Boyd. 'Theological Presuppositions'; 477, 478, 497, 542-545. Maisch. 'Incest'; 223-224. Ashley. 'Honourable Estate'; 54. Ireland. 'Divorce'; 93.

principle - "None of you shall approach to any that is near of kin to him, to uncover their nakedness" - and verses 7 to 18 as illustrating this principle by citing examples. The complete list of forbidden degrees was produced by analogical reasoning and this was the method used to compile the table included in the Act of 1649. The table is particularly valuable as it can be analysed to show the logic behind the forbidden degrees, and thus illustrate certain aspects of the kinship system. Its value is increased by the lack of similar material. The paragraphs in Craig's 'Jus Feudale' (c1603-1608) and Stair's 'Institutes' (1681) dealing with the forbidden degrees are brief, and their conciseness obscures their meaning to the modern reader.<sup>1</sup>

The first three rules are fairly obvious. Rule number one is that the relationship is forbidden whether viewed in terms of ascent or descent. Thus son's daughter and daughter's daughter in verse 10 can be extended upwards to include father's mother and mother's mother. The second is that no distinction is made between descent in the male line and descent in the female line. The combination of these two rules means that verse 7's prohibition on intercourse with father and mother can be extended to daughter. The patrilineal nature of inheritance is not reflected in the forbidden degrees. Nor was any distinction made where descent was only by one partner in a marriage: step-son was the same relationship as son. As the footnote to the table of 1649 explains

"Consanguinity and Affinity, impeding Matrimony is contracted by them that are of kindred on the one side, as well as by them

<sup>1</sup> Craig. 'Jus Feudale'; 764. Stair. 'Institutes'; 24.

that are of kindred by both sides."<sup>1</sup>

Rule number four concerns the principle behind extending degrees of consanguinity to affinity. As with Canon Law, the wife took the same relationship as her husband in respect of his relatives. This was one aspect of husband and wife becoming one flesh ('unitas carnis') by marriage. Extension by this rule was limited to only blood relationships of the affine. For instance, verse 12's restriction on father's sister is extended to wife's father's sister but not wife's brother's wife.

The fifth rule is mentioned by both Stair and Craig. According to Stair,

"of Ascendants and Descendants, there is properly no Degree, the Great-grand-mother, being in that Regard as near as the Mother". From this principle Craig deduces that a great-grandson cannot marry his great-grandfather's sister.<sup>2</sup>

The difficulty here is that the table of 1649 does not include relationships in the direct line remoter than granddaughter and grandmother. There was probably no conflict in practice as there was very little chance of the first and fourth generations (ego and great grandparent) being alive at the same time, given the contemporary pattern of life expectancy. Certainly no case of incest has been found of four generations, though there are several examples of three generations involving father's father's brother's wife and wife's grand-niece.<sup>3</sup> It is probable that this is because there were no instances of four generation incest rather than that the persons were not prosecuted as incestuous. The

1 'A.P.S.'; VI, pt II, 476.

2 Stair. 'Institutes'; 24. Craig. 'Jus Feudale'; 74.

3 'Just. Cases'; I, 121-22. Graham. 'Ecc.Disc.'; 169.

reason for the omission from the table of 1649 was probably pragmatic - it was impossible to list all the ascending and descending degrees and the line was drawn at the third generation. Rule 5 is thus that all ascendants and descendants in the direct line are prohibited.

The sixth and final rule concerns the extension of the fifth rule to collateral lines. According to Craig the

"same principle applies as between collaterals 'in loco parentis' and 'in loco filii' respectively: thus, I may not marry my father's sister for she is 'in loco patris'; nor, my mother's sister for (as my aunt) she also is 'in loco matris'. And further, those who stand to each other in the first degree of collateral relationship - though not parents and children in any sense - are subject to the same prohibition as if they were".<sup>1</sup>

This means that the prohibition on marrying your brother's daughter was extended to brother's daughter's daughter. There is, however, one important exception: father's brother's daughter was not a forbidden degree, although it was similar to brother's daughter according to rule five. The application of rule five to the collaterals is summarised in the Act of 1649 as no person may marry

"with a brother or sister of one in the direct line: ..... or with the relict of a brother or sister of these in the direct line; though never so far asunder in degree"<sup>2</sup>

The way these rules were used to extend by analogy a relationship expressly forbidden in Leviticus XVIII can be illustrated by using verse 14. This expressly forbids father's brother's wife and was extended to a further fourteen relationships. Rule one extends

<sup>1</sup> Craig. 'Jus Feudale'; 764.

<sup>2</sup> 'A.P.S.'; VI, pt II, 476.

the prohibition to brother's son's wife, and rule two gives mother's brother's wife and sister's son's wife. Rule five - there is properly no degree in ascendants and descendants - plus rule two produces: father's father's brother's wife, mother's father's brother's wife, father's mother's brother's wife, and mother's mother's brother's wife; brother's daughter's son's wife, brother's son's son's wife, sister's daughter's son's wife, and sister's son's son's wife. This leaves three remaining relationships to be explained. The first is derived more directly from verse 12's prohibition on father's sister (verse 14 being the affine equivalent). Wife's brother's daughter is the affine equivalent of father's sister viewed as a descending relationship. The remaining two are more difficult - father's father's wife and mother's father's wife which can be expressed as step-grandmother - as they are more appropriate to verse 10's son's daughter. They are included under verse 14 as the ascending equivalent of brother's/sister's son's wife.

The main reason for explaining in detail the method of extending the forbidden degrees is to gain some knowledge<sup>36</sup> of the key kinship relationships. The core of these, as would be expected, were those of the immediate family: husband - wife, parent - child, siblings. Other relationships are subsumed into this basic framework, for example, step-mother, step-son, step-brother. The most important feature is the use of 'in loco parentis' as a model not only for grand-parent - grand-child, but also uncle/aunt - nephew/niece: "all these are Parents and children, or in the place of parents and children one to another".<sup>1</sup>

<sup>1</sup> 'A.P.S.'; VI, pt II, 476.

The law on incest thus illustrates the idea that the grandfather and uncle could act as substitutes for the father. It would, therefore, be not surprising if they acted as guardians to orphans, or if their orphaned grandchildren or nephews/nieces were brought up in their households. The idea of 'in loco parentis' was not merely a legal fiction, but a relationship which carried with it responsibilities and obligations, particularly for the uncle who had inherited the family property. The emotional ties with more distant kin were weaker so that the idea of cousins marrying was not socially repugnant. The use made of kin, however, would depend on specific factors - residential propinquity, personalities, and the ability to meet the obligations. If there is less evidence of the lower sections of society using the kinship network, this does not necessarily mean that they did not recognise the duties of the relationships. These were the people who were less able to provide the support in a manner which would be revealed in the remaining historical records. The same kinship system applied to lords, lairds and peasants but for some there was more to be gained from it than others. Wealth and position helped the participants to turn responsibilities into deeds.

### 7.3.2. Relationships established by intercourse.

Incest could be committed either by marriage or intercourse, and the relationship which made it incestuous could be established by blood, marriage or sexual intercourse alone. The latter has confused some modern commentators. For instance, in 1628 George Sinclair, reader at the Kirk of Baith and teacher at Keltieheuch, was tried for adultery, forgery and incest, and was sentenced to be executed by drowning. The terms of the charge of incest were that

"he maist shamefullie gaif the use of his body to twa zoung damosellis baith being sisteris.... baith his scolleris and zoung virganes and thairby committand nottour and manifest incest". Gillon (the editor) says that this punishment was unique and that the word incest for seduction does not occur again.<sup>1</sup> In a similar case of 1646 the offender was hanged. Jean Knox was convicted of incest because she married the brother of the man who had made her pregnant five months before. The editor, J.I. Smith, says that since the original relationship was one of fornication and plainly condemned by the Kirk, the logic of her conviction for incest is difficult to follow.<sup>2</sup> In fact both of these relationships were incestuous, and incest was committed where the relationship was based on intercourse alone.

The authority for this interpretation is Leviticus XVIII. Verse 17 says that

"Thou shalt not uncover the nakedness of a woman and her daughter, neither shalt thou take her son's daughter, or her daughter's daughter, to uncover her nakedness; for they are her near kinswomen: it is wickedness."

Verse 18 expressly refers to the relationship involved in the case of 1646: taking the sister as your wife. Canon Law incorporated this into the law of incest for both affinity and consanguinity. Affinity was produced by any carnal copula, whether performed within or outside of marriage, and for consanguinity it made no difference whether the descent was by marital intercourse or fornication.<sup>3</sup>

1 'Just.Cases'; I, 95, 96.

2 'Just.Cases'; II, xlv-xlv. MacKenzie. 'Laws'; 160.

3 Hay. 'Lectures'; 187, 219.



Affinity also arose from a valid betrothal. The Reformers retained this part of the Canon Law (except for the impediment of public propriety) and it was not until 1827 that the Court of Session held that affinity did not arise by sexual intercourse alone without marriage.<sup>1</sup>

This form of relationship is not specifically mentioned in the act of the General Assembly of 1560, or in either of the Acts of Parliament of 1567. It was probably assumed that this was self-evident as it was mentioned in Leviticus XVIII. Certainly there is evidence that incest arising from a relationship established by intercourse alone was recognised as incest by both the Church and the State in the 1570's. The first mention that has been traced is in a letter of 30 June 1569 from the Regent to the General Assembly. During a visit by the Regent to Elgin, Nicoll Sudderland and a woman had been convicted of incest by the assise. The Regent wanted the Assembly's advice on this case as

"the question is, whither the same be incest or not; sa that we behoovit to delay the executioun, quhill we have your resolution at this Assemblie. The case is, that the woman was harlot of befor of the said Nicolls mother brother. Mr Robert Pont can informe you more amplie, to whose sufficiencies we remitt the rest".

The Assembly resolved on 9 July that the offence was incest.<sup>2</sup> The speed of the reply suggests that the question raised little controversy, though there must have been some doubt for the Regent to have referred it to the Assembly. Perhaps the doubt concerned the application of the death penalty - mother's brother's woman

<sup>1</sup> Ireland. 'Divorce'; 93. (Hamilton vs Wyllie).

<sup>2</sup> 'B.U.K.'; I, 152-153, 154.

was not expressly forbidden in verse 14. It is also interesting<sup>e</sup> that it was the Regent who approached the Assembly, rather than the Assembly remitting it to the civil magistrate for a decision as happened in 1566 with father's brother's daughter.

This decision was confirmed by the General Assembly in 1571 in the context of an incestuous marriage rather than incest by intercourse. The question was basically about the concealing of an impediment to marriage: the incestuous nature of the marriage was only of secondary interest. The Assembly was asked

"Quhat ordour sall be takin with her quho committing fornication with a man, dois suffer the same man heirafter to marrie her awin sister; and heiring the bands proclamit wald not reveile the impediment, but be conceilling of the crime, was guiltie of the incest following."

The Assembly found that

"Both he and she to be punishit according to the discipline of the Kirk, bot cheiflie the man; and the second cannot be his wife".<sup>1</sup>

Two examples show that kirk sessions and the civil courts in the 1570's recognised incest arising from affinity produced by intercourse. These do not, however, show that this recognition was widespread as they are isolated cases. The Kirk Session involved was that of St. Andrews and it is not surprising that they followed the General Assembly's decision. The case involved the declaration of an impediment to marriage, or rather that Elspet Wallace was asked under oath if she had declared to her sister before the sister's marriage to Lucas Storm that he had had intercourse with her. This part of the charge was not proven and Lucas

<sup>1</sup> 'B.U.K.'; I, 196.

Storm confessed to adultery and incest with Elspet Wallace after he had married her sister. The Session remitted him for punishment to the magistrates.<sup>1</sup> This case shows that the Session recognised intercourse with one sister as an impediment to marriage with the other sister. The case before the civil court was similar as it involved an incestuous marriage to the woman's sister. In 1573 Marion Reid was delated for incest with Gilbert Young

"being his wife, and knowing perfitlie hir said spous to have lyne in Fornicatioune with Janet Reid hir sister, of befoir, and ane barne procreat betwix thaim".<sup>2</sup>

The case was remitted to the justice-air of Ayr and the outcome of the trial is unknown.

The only mention of this form of incest that has been traced in the acts of the Church courts and Acts of Parliament in the seventeenth century is in the Act of Parliament of 1649. In the note to the table of forbidden degrees it is stated that

"Consanguinity and Affinity impeding Matrimony is contracted by ... unlawful company of man and woman, as well as by Marriage."<sup>3</sup> There are, however, a sufficient number of cases in both the civil and Church courts in the seventeenth century to show that this interpretation was accepted both before and after the Restoration (appendix 4). A total of thirteen cases have been found between 1625 and 1729, and no doubt there are more. Nearly half are from the Church courts and eight involve siblings. The punishment is known in only three cases - 1643 beheaded, 1646 beheaded and in 1669 hung. The last case cannot be taken to show that the death penalty was exacted for this kind of relationship after 1660 as the

1 'K.S.Reg.St.Ands (1)'; 374-375, 377.

2 Pitcairn. 'Crim. Trials'; I, 41.

3 'A.P.S.'; VI, pt II, 476.

man was also convicted of theft, robbery and sorning.

The reason why relationships based on intercourse alone were included as incestuous becomes more obvious when it is shown that a majority of these thirteen cases specifically mention the procreation of bastards. There was a need to include illegitimate offspring within the forbidden degrees, particularly as the parents were held responsible for the maintenance of the child. In the commonest relationship of the thirteen cases, the child would be both husband's child and sister's child to the wife, and conversely the wife would be mother's sister and father's wife to the child. The child's status would be ambivalent: first because of his illegitimacy and second because of the incest of his father. He would not fit into the structure of social relationships. However, this suggestion does assume that the bastard did have some claims on his parents.

If this argument is correct it illustrates that the forbidden degrees were based on the potential consequence of incest - children - rather than the fact of incestuous marriage or incestuous intercourse. Children could not be concealed or ignored and had to be fitted into society unlike intercourse which could be ignored or marriage which could be annulled. It is almost as if a distinction was not made between intercourse and procreation. This is not surprising if it is recalled that in the theology of Canon Law intercourse within marriage could be sinful unless the intent was to avoid fornication and/or to produce children. Sex was procreation, although this does not imply that it was also affectionless or without erotic pleasure. The same incest rules applied to intercourse and marriage because these acts were not separated:

marriage implied intercourse, and intercourse implied children.

#### 7.4. The 'horror' of incest.

The incest taboo is usually said to be associated with feelings of revulsion and horror against any such acts and their severe punishment. This interpretation does apply to the official view of the Church as incest was ranked as a very serious sin. It was sometimes viewed as abhorrent as sodomy and bestiality (as in Leviticus XX), and worse than adultery, particularly as incest could also be adulterous. For instance, when the General Assembly was supplicated in 1642 to procure the magistrate's aid in curbing and punishing notorious vices, the offenders were listed as

"adulterers, incestuous persons, witches, and sorcerers, and others guilty of such grosse and fearfull sins".<sup>1</sup>

Incest was still ranked with these same serious sins at the end of the period under study. By the 'Form of Process' of 1707 these offences were to be considered by Presbyteries because of the "actrocity of the scandal, or difficulty in the affair, or general concern". These matters were listed as -

"incest, adultery, trilapse in fornication, murder, atheism, idolatry, witchcraft, charming, and heresy and error" made public, "schism and separation from the public ordinances, processes in order to the highest censuresof the Church, and continued contumacy."<sup>2</sup>

A similar sense of horror is expressed in the Acts of Parliament against committers of incest. Incest is described in 1567 as "the abhominabill, vile, and filthie lust of incest" and in 1649

1 'G.A.Acts'; 64.

2 'G.A.Acts'; 411.

as "abominable and vile".<sup>1</sup>

The Commissions granted by the Privy Council to try persons accused of incest use the same expressions. In a Commission of 1621 the charge is "for the filthie, detestable and abominable crime of incest"; in 1628 "vile and abominable incests"; in 1631 "most offensive to God and not worthie to be heard of in a countrie subject to law and justice"; and in a court case of 1613 "the abominable, vild, and filthie vice of Incest, being sa odious and detestable in the presence of Almichtie God".<sup>2</sup>

The use of the same basic words - 'abominable, vile' - gives the impression of a standard format rather than a spontaneous expression of horror. This is what would be expected in Commissions and court cases as a set formula is usually evolved. In these examples the set phrases are taken from the Act of 1567. Thus the use of words expressing horror in the court cases cannot be taken to prove more than that incest was regarded officially as an abominable and vile crime.

It is to be expected that if incest was viewed with great horror, people found guilty of incest would be executed under the Act of 1567. The records have not been sampled in a consistent manner, but the cases that have been found do show that 26 people were sentenced to death for incest. These are taken from a wide variety of printed sources, and are mainly (15) from between 1640 and 1660. The methods included drowning, hanging, beheading, and strangulation at the stake. For instance, James Stewart was found guilty of adulterous incest with his wife's sister and he was sentenced to

"be tane to the Mercat-croce of Edinburgh, and thair to be

<sup>1</sup> 'A.P.S.'; III, 26; VI, pt II, 475.

<sup>2</sup> 'R.P.C.'; XII<sup>1</sup>, 441; II<sup>2</sup>, 317; IV<sup>2</sup>, 317. Pitcairn. 'Crim. Trials'; III, 248.

wirreit at ane staik, quhill he be deid; and thairefter his body to be brunt in asches: And all his moveabill guidis to be escheit".<sup>1</sup>

The fate of the partner in the incest is not known in many cases, but women were executed as well as men - 10 out of the total of 26. Nicoll noted in his 'Diary' that on 13 February 1656,

"Four persones hangit on the Castel-hill, ane man for witchcraft, and thrie wemen, all of thame for horrible incest of exceiding near propinquitie not to be named".<sup>2</sup>

Sometimes the offender was also found guilty, or accused, of other crimes which carried the death penalty - for example, adultery, murder, child murder, robbery, sorning, bestiality, sorcery - so that the death penalty may have been for one of these other crimes or for all of them combined. This material does not show that incest was viewed with great horror, but only that on some occasions people, both men and women, found guilty of incest were sentenced to death and executed.<sup>3</sup>

1 Pitcairn. 'Crim. Trials'; III, 249.

2 Nicoll. 'Diary'; 174.

3 References to the cases are:

Arnot. 'Crim. Trials'; 306-307 (1630, 1649).

Chambers. 'Domestic Annals'; II, 28-29, 332-333 (1629, 1643, 1649, 1670).

'Just. Cases'; I, 95-96, 121-122 (1628, 1629); II, xlv-xlv (1646).

'Just. Court'; I, 315 (1669).

Lamont. 'Diary'; 28, 218 (1651, 1670).

MacKenzie. 'Laws and Customs'; 160 (1641, 1646, 1649).

Nicoll. 'Diary'; 149, 174, 202 (1655, 1656, 1657).

Pitcairn. 'Crim. Trials'; II, 576 (1624); III, 248-249 (1613).

'R.P.C.'; III<sup>2</sup>, 199, 218-219, 511-512 (1629); VII<sup>3</sup>, 557 (1682); VIII<sup>3</sup>, 86, 203, 279 (1682).

The total of 26 cases includes those sentenced to death as well as those actually executed (14). The sentences were not necessarily carried out. Janet Forman escaped execution by fleeing, although her corespondent was less fortunate and was hanged at Kirkcaldy.<sup>1</sup> In a case of 1683 Janet Sinclare and Niven Herron sought a reprieve from the sentence of death for incest and child-murder on the grounds of insufficient evidence. The Privy Council recommended that the King should grant a remission.<sup>2</sup> More interesting is the case of John Weir of Clenochedykes who had married Issobell Tweddall. He was her first husband's brother's grandson. Their minister had refused to proclaim their banns as the marriage was unlawful, and they married in England. They had been excommunicated since December 1625 for refusing to separate. The Privy Council had ordered the King's Advocate to pursue him criminally and John Weir was found guilty of incest in April 1629 and sentenced to have his head struck from his body at the Mercat Cross of Edinburgh. But the sentence was never carried out. The Privy Council recommended to the King that he exercise clemency because

"the degrees ar so remote that the like heirof hes not to our remembrance heertofore occurred" although "the mariage indeid is unlawfull and forbidden by the Word of God, and the parteis offence the more inexcusable that being required be the Church he refused to absteane".

The King accepted the Privy Council's recommendation that the doom should be changed and remitted further action to their discretion. On 1 April 1630, a new doom was ordered to be pronounced in the

<sup>1</sup> Lamont. 'Diary'; 28.

<sup>2</sup> 'R.P.C.'; VII<sup>3</sup>, 557; VIII<sup>3</sup>, 86, 203, 279.



Justice Court sentencing John Weir to banishment after he had made satisfaction to the Church. This case shows that on at least one occasion the Privy Council intervened to reduce the sentence, although there was no suggestion that the trial had been irregular or that the death penalty was not applicable. It is also interesting that John Weir had refused to accept the Church's ban on the marriage and that he obviously had no feelings of revulsion or horror. It had also taken three years for him to be brought to trial.<sup>1</sup>

It has already been suggested that the Act of 1567 for the punishment of incest by death did not apply to all degrees of incest, and that one of the purposes of the Act of 1649 was to make it clear that death was the penalty for degrees based on analogy as well as those specifically named in Leviticus XVIII. This is important because if this interpretation is correct it shows that a distinction was made between different degrees of incest and that the official sense of revulsion was qualified by the nature of the offence. Some kinds of incest were considered more revolting than others. It also raises the question of what other penalties were applied and whether the graduation was based on nearness of degree. The John Weir case is relevant as he was sentenced to death for a degree not expressly forbidden in Leviticus XVIII, and there is no suggestion that this was improper. In at least one case before then it had been argued that the Act of 1567 did not apply to all degrees of incest, either in principle or in practice. In 1626 Alexander Gourlay was tried for incest with his wife's mother's sister, and in fact declared innocent. This was a relationship not expressly forbidden in

<sup>1</sup> 'R.P.C.'; III<sup>2</sup>, 218-219, 512. 'Just.Cases'; I, 121-122. Chambers. 'Domestic Annals'; 28-29.

Leviticus XVIII. He had made two principal legal arguments in his defence. The first was that the Act of 1567 did not make incest with affines a crime and

"inflictis nocht the puneishment of daith unto persones transgressing within the forbiddin degreis of affinitie".

His second defence was that the Act had never been applied to degrees of affinity:

"that 'perpetua desuetudine' the act of parliament is abrogat and was nevir exponit to be extendit to degreis of affinitie within this kingdome and thairfoir desire the Justice to tak advice of the lordis of counsell and sessioun 'in re tam nova' and nevir practizet of befoir and that the matter quhill advise be tane may nocht pas to ane assise".

Both arguments were rejected by the Court.<sup>1</sup> In the cases of John Weir and Alexander Gourlay the Act of 1567 is interpreted as applying to all degrees of incest. However, there is evidence to show that incestuous persons were dealt with more leniently and only two other cases are known where the persons were sentenced to death for analogous degrees. One of these is two years after, and the other four months before the passing of the Act of 1649. It is plausible that by the 1640's a different interpretation was made of the Act of 1567 to that in the late 1620's. Perhaps the Courts accepted that the remoter degrees of incest should be punished less severely as had been implied by the Privy Council in the case of John Weir, or that the Act of 1567 was interpreted in different ways by different people at the same or different times.

<sup>1</sup> 'Just Cases'; I, 48-49, 54.

In 1591 the Burgh Council of Aberdeen considered the crime of incest committed by Patrick Prat with Christen Craik, his late wife's sister's daughter. This relationship was not expressly forbidden by Leviticus XVIII. There are the normal expressions of revulsion -

"horribill and hainous crime", "ane sin sa odious that it procuris the wraith and displeasour of God, to be pured on that citie and congregatious quhair the same is committit". But Patrik Prat was not executed, nor even remitted to the criminal courts. As an example to others the Council ordained that he

"sall sit thrie severall mercat dayis ... bound to the croce of this burght, in the brankis lockit, haffing ane crown of paper on his heid, conteining the inscription of the crime committit be him ... and that thrie severall Sondagis he sall stand in the hairclaith bair futtit and bair lit, at the kirk dur of the said burghit" before the sermon "and to sit at the pillar of repentance "during the sermon "and thaireftir to be exilit and baneist this burght".

He would only be allowed back after he had been received again into the Church, paid a penalty to the poor, and admitted by the Burgh Council. There is a contrast between the words of condemnation and the punishment, which although harsh is not comparable to death. But more surprising is the reason given by the Burgh Council for this form of punishment -

"and be the lawis estableschit within this realme thair hes not bene ane ordour of punischment for the samen sa speciallie devisit as neid requirit".<sup>1</sup>

<sup>1</sup> 'Burgh Recs.Abdn.'; 71.

It is of course possible that the Council were not aware of the Act of 1567 as there was considerable difference between the passing of an Act and its application. Equally feasible is the interpretation that the Council dealt with the offence themselves because they believed that the Act of 1567 only dealt with degrees expressly forbidden by Leviticus XVIII.

The next piece of evidence is much more significant because of its date and authority. On the 28 July 1629 the Privy Council issued instructions on the crimes to be tried by the circuit courts of the Justices. This was 15 days after the Privy Council had written to the King recommending clemency for John Weir who had been sentenced to death for incest in the third collateral degree. One of the offences in the instructions was "incest in 'gradu tertio collateralis'". The circuit courts were ordered

"to proceed to the triall and punishment of the persouns guilty of the crimes abonewritten (incest in third collateral degree, adultery and bigamy) or anie of thame by imposing of pecuniall soumes and fines upon thame allanerlie, and taking sufficient caution of the persouns convict of charming and consulting with witches and sorcerers and convict of incest, adulterie and mareing of twa wiffes, in maner foresaid, that they sall satisfie the Kirk, and that the incestuous persouns sall separat and that all the saids persouns sall forbear in time comeing".<sup>1</sup>

No mention is made of further penalties and it would appear that officially incest in the remoter degrees was to be punished only by fining, satisfaction to the Church, and a promise of good behaviour. The Act of 1567 is not even mentioned perhaps because

<sup>1</sup> 'R.P.C.'; III<sup>2</sup>, 258-259.

relationships of the third collateral degree were not expressly forbidden in Leviticus XVIII. Incest was also punished by fining during the English administration of Scotland. In a letter to the Speaker of the English Parliament, Mr William Clarke, secretary to the military governor, wrote that the English Commissioners for administration of Justice at Edinburgh had spent the last three days in the trial and fining of several persons for adulteries, incests and fornications, for which there were above 60 persons brought before the Judges in a day.<sup>1</sup> This suggests that the principle of the instructions of 1629 were still being carried out after the passing of the Act of 1649, albeit by judges appointed by the English administration.

On balance the official expressions of horror and revulsion are not matched by the penalties exacted. Death was not the penalty for all crimes of incest, and a distinction was made between the different degrees. The remotest degrees of incest were punished in that late 1620's and during the English occupation of the 1650's by fining. It is probable that the courts applied a wide range of penalties - fining, stocks, corporal punishment, imprisonment, exile - up to and including death for the closest degrees, or where the offence was compounded with other offences, eg. adultery, infanticide. This is probably more than the usual difficulties of enforcing statute law which applied to incest as much as to lesser crimes like fornication.<sup>2</sup>

Little can be said of the 'unofficial' attitude to incest,

1 Firth. 'Scotland Commonwealth'; 367-368. Incest was made a felony in England in 1650.

2 eg. 'R.P.C.'; I<sup>1</sup>, 499 (1576).

although it is probable that not everyone reacted with the same feelings of horror as some members of the Church. Certainly some people avoided making satisfaction to the Kirk for some years, or refused to accept that their marriage was incestuous and <sup>to</sup> separate from their 'wives'. John Weir, for instance, married in England and was not brought to trial for 3 years. There are other examples as well. Alexander Blair fled to England to marry his first wife's half-brother's daughter. Donald McOshie cohabited with his daughter-in-law long enough to procreate three children before a commission was issued for his trial. Marjorie Anderson committed incest with her son-in-law for four or five years before being accused before Elgin Kirk Session. James Miller refused to accept that his marriage with his first wife's sister's daughter was incestuous, and defied the order of the Kirk Session of St.Andrews to separate for fifteen months. In 1622 the Synod of Fife ordered the St Andrews Session to execute an act of excommunication against John Ramsay

"quha hes bien theis sex or sevin yeirs bygane lying under the heavie sentence of excommunication for the hainous crim of incest committed be him with his awin douchter, (yet) remains peaceablie within the bounds of the paroche of St.Androis, and no ordour is taken therewith".

His daughter had been excommunicated in 1616 for incest with him.<sup>1</sup> These examples tend to support William Clarke's barbed comments

<sup>1</sup> Arnot. 'Crim.Trials'; 306. 'R.P.C.'; III<sup>2</sup>, 52.  
 Hair. 'Before the Bawdy Courts'; 121-122, no. 285.  
 'K.S.Reg.St.Ands' (1); 561, 566-567, 577, 580, 592.  
 'Synod of Fife'; 84, 95.

about the work of the English commissioners in the letter of 1652:

"it is observable, that such is the malice of those people that most of them were accused for facts done divers years since, and the chiefe prooffe against them were their owne confessions before the Kirk, ... Some of the facts were committed 5, some 6, 10, 16, 18, and 21 years since."<sup>1</sup>

No doubt some of the delay was inherent in the haphazard and lengthy legal processes or lack of firm evidence for a criminal trial but in these cases there does not seem to be any urgency derived from a sense of outrage. Nor is there much evidence for community pressure against incestuous persons which might be expected if incest was viewed by society as horrendous. Local pressure is apparent in only one instance. In a supplication to the Privy Council in 1662, Thomas Rae of Dumfries claimed that he had been accused unjustly of incest. The assise had found him not guilty unanimously. He now craved the protection of the Privy Council because the minister and others in the burgh refused to suffer him to live there or within the sherifffdom where he had lived for the last 95 years, and would have him banished.<sup>2</sup> The local community, under the leadership of the minister, appears to have been using extra-legal pressures, though their hostility may have been based on other grounds than the accusation of incest.

The 'official' attitude to incest was horror: it was a vile, abominable, odious sin and crime. This attitude was reflected in the phrasing of the Acts of Parliament, the views of the General

<sup>1</sup> Firth. 'Scot. and Commonwealth'; 367-368.

<sup>2</sup> 'R.P.C.'; I<sup>3</sup>, 194-195. The 95 years is not a misprint.

Assembly and the Commissions granted by the Privy Council. The Act of 1567 made incest punishable by death and some offenders were executed. But not all offenders were sentenced to death, and a distinction was made according to the degree of consanguinity and of affinity. Some offenders were punished merely by fines. At the local level the 'official' attitude of horror is contradicted by a number of cases where years elapsed before a known offender was brought to criminal trial. The cases collected do not provide an adequate sample to suggest firm answers, as they are derived unsystematically from a variety of sources which often only give the minimum of detail. Perhaps individual cases were graded according to the degree of incest, whether the degree was of consanguinity or affinity, if children were procreated, or if adultery was also committed. Cross-generation incest may have been punished more severely than intra-generation incest. Then, of course, there are variables effecting the enforcement of the law: the personal attitude of the judges and the local minister, the accused's character and reputation as known by his neighbours. Even the 'official' attitude at the national level may have been affected by the relationships between the Church and State, or by the political dominance of a particular group as in 1649. But leaving aside speculation, it is possible that there were periods when incest was prosecuted more frequently and punished more severely than at other times, as may have happened with witchcraft and possibly even adultery, sodomy and bestiality.

The 'official' attitude to incest contained within it a mechanism to validate and trigger campaigns to severely punish incestuous persons. The Act of 1567 anent committers of incest states that incest



"is sua usit within this Realme, and the word of God is in sic sort contempnit, be the usaris thairof, that God be his just judgementis hes occasioun to plague the Realme, quhair the said vice is committit."<sup>1</sup>

Similarly the Act of 1649 claimed as a justification that Parliament desired

"to provide a sufficient remedy against all these evils, and that the wrath of God (which could not but lie heavy upon the Land, by impunity of such abominable crimes) may be averted".<sup>2</sup>

This connection between unpunished sexual sins and God's wrath is also accepted by Nicoll. Along with comments on political and religious matters, he included in his 'Diary of Public Transactions' notes on the weather, storms, harvests, comets and other portents, and executions for incest and other sexual crimes. The way these were associated is illustrated in the following passage:

"In Marche and Aprill 1655, thair wer sindry persones dilaitit, accused and sum of thame contempnit for incest and murther, and uther odious crimes. And upone the 10 day of Aprill, ane old man of thriescoir yeiris suffered death and wes hangit in the Castelhill, for incest committit with his awin sister dochter. Thir and mony uther hinous sinnes of the land produced much takines of Godis wraith; namelie, in this spring time, for all Februar and a great pairt of Marche wer full of havie weittis, cold and stormie, the like quhair- of haid not bene mony yeiris befoir; and the rest of that moneth of Marche, and till the 15 of Aprill, thair wes such abundance of cold

<sup>1</sup> 'A.P.S.'; III, 26.

<sup>2</sup> 'A.P.S.'; VI, pt.II, 475.

frost, that the frost in many pairtes buir both hors and man above, throw the land, in the moneth of Aprill."

He also believed that there had been more cases of incest and bestiality during 1650-1657 than there had been in the preceeding fifty years or more.<sup>1</sup>

'Natural disasters' could be explained within this mental framework by the occurrence of sexual sins, especially if they went unpunished. Biblical authority validated this belief. The committers of incest, sodomy, bestiality and adultery defiled themselves,

"And the land is defiled: therefore I do visit the iniquity thereof upon it, and the land itself vomiteth out her inhabitants".<sup>2</sup>

'Natural' disasters could be seen as a clear sign from God that such crimes were going unpunished and that the law should be applied more vigourously. Periods when the law was applied in all its severity may be times when greater diligence was taken to search out and pursue such offenders to the death in order to placate the wrath of God and to avoid future bad weather and bad harvests.

#### 7.5. Summary.

Anthropological work on incest has emphasised the universality of the taboo and its variety of definition. The Indian Kuki, for example, only forbid incest between mother and son, while the Kalangs of Java regard such marriages as bringing perpetual good fortune. A contrast has also been revealed between the letter of law and practice. For instance, work in the Jewish quarters of

1 Nicoll. 'Diary'; 152-153, 202.

2 Leviticus XVIII, 25.

Tangier, Fez, Marrakesh, Oran and Algiers has shown that brother-sister incest is so common as to be regarded as normal although strictly forbidden.<sup>1</sup> Macfarlane summarises the anthropological studies as showing that, although incest is universally regarded as abhorrent,

"it is practically impossible to find societies which actually punish incest physically ... not only is incest treated lightly in a number of societies, but also that even where it has been assumed to have been an awful sin and crime, closer inspection shows that there is little evidence, beyond hearsay, for this."<sup>2</sup>

Scotland is therefore unusual in that the punishment of incest was sometimes as severe as the words used to express horror.

Explanations of incest tend to concentrate on exogamy and personal relationships within coresidential units. There is also the idea of preserving the purity of the people and the race by preventing the inbreeding of hereditary defects. The functional arguments are based on the assumption that the incest prohibitions are reflections of the kinship arrangements within a society. Hay recognised this when he justified the fourth Lateran Council's revision of the forbidden degrees from seven to four on the assumption that it is

"reasonable to restrict marriage to those degrees of consanguinity beyond which there does not seem to be any carnal love or friendship."<sup>3</sup>

1 Maisch. 'Incest'; 35, 36.

2 Macfarlane. 'Marital and sexual relationships'; 33.

3 Hay. 'Lectures'; 207; see also 193.

On this assumption the Scottish kinship system was bilateral, with equal emphasis given to affines as to consanguines, and consisted of parent-child, sibling, and child-parent's sibling dyads. Collateral lines were particularly important until cousin-cousin relationships were reached where the emotional tie was weak enough for their marriage to be contemplated without feelings of impropriety. Direct lineage, both ascending and descending, was the spine of the kinship network. It has been already suggested that the reason that the prohibitions on incestuous intercourse were the same as incestuous marriage was the belief that procreation was the main justification for intercourse and that intercourse was only permissible within<sup>marriage</sup>.

A direct correlation between forbidden relationships and the kinship network is, however, too simple. In Scotland itself the prohibited degrees probably only reflect Lowland practice, omitting the Highlands and Islands, and the Borders. The description of kinship is also so general that it would fit most Western European traditional societies and Colonial North America. However, the post-Trent prohibited degrees were wider in scope than those of Scotland while those of the English Act of Parliament of 1563 were narrower.<sup>1</sup> For instance, Demos deduces from the wills of seventeenth century Plymouth in New England that

"a man was involved, first of all, with his wife and children, then with his grandchildren. Somewhat less intense was the relation to his own brothers and sisters, and to their children. Parent-child; grandparent-grandchild; brother(or sister)-brother(or sister); uncle(or aunt)-nephew(or niece): this was the general order of priority".<sup>2</sup>

1 For England see Macfarlane 'Marital and sexual relationship's, 44; and for Trent 7.1. above.

2 Demos. 'Little Commonwealth'; 124.

In twentieth century Ashworthy parents, grandparents, uncles, aunts, brothers and sisters were known as 'the family' or 'very close relatives'.<sup>1</sup> Ralph Josselin, a seventeenth century rector in Essex, had close ties with his siblings, uncles and grandchildren but cousins were much less important.<sup>2</sup>

The dislocation between the forbidden degrees and kinship practice has a number of explanations. The first is that the prohibited degrees are a generalised system which describes a web of potential rather than actual relationships. For instance, in theory the system was bilateral with affines as important as consanguines. Ralph Josselin, however, appears to have made a distinction terming affines as 'friends' rather than 'relations', thus placing them between blood relatives and neighbours.<sup>3</sup>

In Scotland the retention by the wife of her maiden name may mean that blood-ties were more important than marriage ties: she was still distinguished from her husband's relatives. Furthermore, Alexander Gourlay's defence against the charge of incest in 1626 assumes that affinity is not of equal importance as consanguinity. The turning of potential relationships into actual ties would depend on personal choice and possible benefits. It is probable, for instance, that the aristocracy recognised kin beyond the forbidden degrees because second and third cousins looked to them for patronage, and they could seek political advancement by incorporating distant kin into their following.

The second is that the system suffers from inertia: any reforms to the prohibited degrees are likely to occur some time after they become dissimilar from potential kinship relationships, and perhaps

1 Williams. 'West Country Village'; 51-52.

2 Macfarlane. 'Ralph Josselin'; 128, 137, 156.

3 Macfarlane. 'Ralph Josselin'; 143.

only when the prohibitions can no longer be evaded. The reform of the degrees in 1560 reflected changes which had already occurred in society. The system of dispensations provided a means of evading the forbidden degrees, but it was time-consuming and costly, and did not provide sufficient security that the children would not be disinherited through some legal technicality. It will also be recalled that it took sixty years for the British Parliament to pass an act allowing marriage with the deceased wife's sister.

The most important reason, however, is that laws are not necessarily an expression of the normative standards of society. Legislative enactments can be statements of what standards should be rather than what they are, and be passed to cause changes rather than adapt existing laws to changed situations. It is also rather sweeping to argue that society has a standard norm. As Taylor points out the

"critical relative factor in the legal norm is its dependence not upon the general standards which are operative in the community ... but upon the interests of specific groups within that community".<sup>1</sup>

This may not detract, however, from the significance of the Scottish prohibited degrees, although the Acts of Parliament of 1567 and 1649 against incest were passed because a particular political group was in power. Their intention was to punish incest with death rather than to impose a new definition of incest. The debate in the 1640's, for instance, was concerned with penalties for incest in remoter degrees. There is thus little reason for supposing that the Acts included different concepts of kinship to that of the rest of Lowland society. The table of 1649 probably reflects

<sup>1</sup> Taylor. 'Deviance and Society'; 52.

the contemporary kinship system. It is, however, possible that the bilateral nature of the forbidden degrees was an anachronism due to the continued influence of Canon Law, and a recognition of the affine relationships between grandparents and grandchildren.

The forbidden degrees prevented marriage between people who were already closely tied together by kinship, and encouraged them to establish kinship relations with previously unrelated people or distant kin. Levi-Strauss describes exogamy's role in society as representing "a continuous pull towards a greater cohesion, a more efficacious solidarity, and a more supple articulation".

Outsider marriage binds separate social units together by links governed by customary obligations and duties.<sup>1</sup> Over four-hundred years earlier the same view was expressed by Hay in his lectures:

"the good of the state chiefly consists in the degrees of consanguinity and affinity, because those who are related by blood or marriage are more ready to rally to the defence or development of the community than others".<sup>2</sup>

A result of exogamy in Western Europe is the binding together of separate family units so that they form a society held together by a web of mutual duties and rights. The individual units benefit by these ties as they represent opportunities for influence and mutual support. These links, however, involved the exchange of wealth with the result that accumulated property and power could be dissipated if the process of extension went too far: instead of strong links binding together strong units, it could result in a large number of weak links between impoverished units.

1 Levi-Strauss. 'Principles of Kinship'; 49.

2 Hay. 'Lectures'; 37.

There were numerous ways of forestalling this, including different systems of inheritance aimed at maintaining<sup>in</sup> the family unit as a discrete entity. Cross-cousin marriages could be used also to reinforce existing ties by bringing together collateral lines. This would be particularly important in areas where children received their portion in cash or kind (eg. apprenticeship, education) and did not return for their inheritance as this method could weaken the ties between siblings in preference to the relationship between father and heir.<sup>1</sup> Cross-cousin marriage recreated ties between the descendants of siblings: father's brother's son would be reinforced by the relationship of wife's brother. It has already been suggested that the most important kind of marriage legitimised by the revision of the forbidden degrees in 1560 was that between cousins.

The second main function of the incest taboo is said to be the avoidance of conflict within the co-residential unit. Kinship relations within the household can represent specific roles with different functions in the maintenance of the unit. These roles were particularly important as the household in traditional society was an economic as well as an emotive and residential unit. When John Carstairs was reflecting on his life in a letter written as a prisoner in Edinburgh Castle in 1650, he used these roles as a measure:

"What have I done as a son to parents? What have I done as a brother? What as a friend? What as a neighbour? What as a husband, a father and head of a familie? What as a minister, a pastour, ...".<sup>2</sup>

1 Sabean. 'Kinship and property'; 110-111. Howell. 'Peasant inheritance'; 154-155.

2 Dunlop. 'William Carstares'; 21.



He thought of his responsibilities to the immediate family, as a relation (friend), a neighbour and to his calling. Those of the immediate family were likely to be those within the household. The functioning of the household could be disrupted if these roles became confused, either by incestuous marriage or by incestuous offspring. This particularly applied to cross-generation relationships, that is parent and child. Richard Burn emphasised this:

"it is directly repugnant to the order of their nature, which hath assigned several duties and offices, essential to each, that would thereby be inverted and overthrown. A parent cannot obey a child; and therefore it is unnatural, that a parent should be wife to a child; a parent, as a parent, hath a natural right to command and correct a child; and that a child, as a husband, should command and correct the same parent, is unnatural".<sup>1</sup>

Although Burn used the example of mother-son, the same principle applied to the usually more common incestuous relationship of father-daughter: your sister could not be your step-mother. The same idea in the form of 'in loco parentis' was used by Craig to justify the prohibition between uncle/niece and nephew/aunt.<sup>2</sup>

It was suggested above that the majority of co-resident kin present in Scottish households would fall within relationships defined as incestuous. The most probable exception is where married brothers and their offspring co-resided as cousins are not included within the forbidden degrees. Perhaps for this reason 'frères'chés'

1 Burn. 'Ecclesiastical Law'; 405 (1781). Quoted in: Macfarlane 'Marital and sexual relationships'; 51.

2 Craig. 'Jus Feudale'; 764.

were unusual in Lowland Scotland; where siblings did co-reside only one sibling was married, the rest remaining celibate or leaving on marriage. The 'frèreche' has often been associated with customs of impartible inheritance of family land, while it has recently been suggested by Sabeau that a weighting in favour of the uncle/nephew dyad was characteristic of areas where unigeniture prevailed.<sup>1</sup> This appears somewhat contradictory as it implies that the uncle/nephew link was likely to be stronger when they did not co-reside. Perhaps the uncle/nephew dyad appears to be more important in systems of unigeniture because the relationship is optional and co-operative. With the frèreche the brother/brother dyad is emphasised rather than uncle/nephew because the frèreche is defined as a household with co-residential siblings and because the collateral relationships are more likely to be competitive and antagonistic rather than cooperative. There was a greater risk of friction, particularly if favour was shown to the nephew in preference to one's own children.

Incest is one of the sexual crimes considered by Macfarlane in his thesis on 'The regulation of marital and sexual relationships'. He bases his conclusions on literary evidence and 37 cases of incest from the courts of Essex 1560-1680. All but five are from the records of the archdeaconry court, and involved 35 out of a possible 426 villages. In only one case, which was before the Quarter Session, was the offender executed - this is not significant in itself as the archdeaconry court could not exact the death penalty, and the offence in this case was compounded by rape. In most cases the

<sup>1</sup> Sabeau. 'Kinship and property'; 100-101.

offender was either excommunicated (15) or the proceedings petered out (8). Macfarlane concludes that incest was rare in Tudor and Stuart England and that it did not arouse any particular horror. It was considered to be a shameful and scandalous offence: in only two of the cases is it described as abominable. Incest was punished only lightly compared to sodomy and bestiality where the theoretical, and in some cases the actual, punishment was death.<sup>1</sup>

In Scotland the sense of horror was much more acute in the official attitude, with abominable often being used to describe the crime. Execution appears to have been used more often as a punishment, although fining was also used as a penalty. The attitude at the local level may have been closer to that deduced for England, though there is the impression that scandalous - a term usually used for fornication - is too mild to describe local attitudes in Scotland. On balance, the impression is that incest was felt to be more horrendous in Scotland than in England. It was ranked after sodomy and bestiality which were punished by death (see appendix 5) but was regarded as only slightly less serious than these offences in contrast to the situation in England.

Macfarlane suggested that this tolerant attitude was related to various general features in English society, and he mentions in particular three structural features. The first is the unlik<sup>e</sup>lihood of village endogamy, as the village population was constantly changing with the frequent movement of people about the countryside. Kin were dispersed and there was little risk of families intermarrying more than once. He argues from this that there was very little

<sup>1</sup> Macfarlane. 'Marital and sexual relationships'; 44-46, 139-140, 157.

risk of incestuous marriages, and that furthermore there was no need for an incest taboo to enforce exogamy. The other two features Macfarlane selected are both concerned with the structure of the household. The possibility of incestuous relations was minimised by the presence in most households of only a couple and their children. It was rare for more than one married couple to co-reside. There was thus little opportunity or temptation for incestuous relations between a newly-married couple and their siblings, sibling's spouse, or parents. This minimisation was also the result of the third and last feature. Children often left home at puberty to become apprentices, servants, or to be educated, so that at no point were there more than two related unmarried sexually mature people living in the same family. Brothers and sisters, parents and children were separated from each other when they reached sexual maturity. Macfarlane therefore concludes that the incest taboo did<sup>not</sup> require to be reinforced by feelings of horror as the structure of society made incest unlikely, and that other forces ensured exogamy and the break-up of the nuclear unit.<sup>1</sup> Although Macfarlane's generalisations about the structure of English society require revision in the light of research since 1968, the contrast between the society he describes and those studied by anthropologists is still valid. But his argument probably cannot be extended to explain why incest was viewed with greater horror in Scotland than in England. If the description of the developmental cycle of the household in the introduction to this thesis fits Lowland society, it shares to a certain extent with England two of the structural features selected by Macfarlane. The first - village endogamy - is unknown. A more plausible explanation for the

<sup>1</sup> Macfarlane. 'Marital and sexual relationships'; 157-160.

differences is probably political. In Scotland Protestant extremists probably had much greater influence on the values and attitudes of those sections of society which made and enforced the law. Certainly they had greater political power, not only when they actually formed the government as in 1567 and 1649, but also through their influence in the General Assembly. It was not so much the risk or frequency of incest, but rather the opportunity to put their ideas into practice and to change the moral attitudes of society which made the official Scottish attitude less tolerant than in England.

## 8. ADULTERY.

### 8.1 Introduction.

Adultery includes a wide variety of sexual offences which all share the characteristic that at least one of the partners is married to someone else. There is the distinction between double adultery, where both partners are married, and simple adultery, where only one of the parties is married. There may be great differences in attitude to single adultery, depending on whether the married party was a man or a woman. Inequality in status may be of importance: adultery with a prostitute whether she is married or not is likely to be regarded differently from fornication with a respectable married woman. The offence may also be compounded with other sins, for instance, incestuous adultery and adulterous 'marriage' (bigamy). Adultery comprehended a wide range of offences and this may be reflected in different punishments. In Scotland this was the case and the criminal penalties were varied and rarely as severe as desired by the Church.

Adultery is unusual in that offenders were liable to civil penalties under Scottish statute law before the Reformation. The only other sexual crime to share this distinction was bigamy, ie. adulterous marriage, which was subject to the same penalties as perjury as being contrary to the oath of marriage.<sup>1</sup>

Both Acts were passed by the same Parliament of 1552. The Act against adulterers was anent them that are

"oppin manifest commoun and incorrigibill adulteraris and will not desist and ceis thairfra for feir of ony spirituell jurisdiction or Censuris of halie kirk to the greit perrell of thair awin saulis".

<sup>1</sup> 'A.P.S.'; II, 486.

It was ordained that such incorrigible adulterers, after all the processes of the Church had been exhausted, should be put to the horn and declared rebels. This was the same penalty as for unrepentant excommunicants so that it may not be the offence of adultery which is being punished, but the adulterer's disobedience and lack of respect for the censures of the Church.<sup>1</sup>

## 8.2 Acts of Parliament anent 'notour' adultery.

The Reformers believed that the State should punish adultery by death. The authority for this was Leviticus XX, verse 10, which said that the adulterer and the adulteress should be put to death (also Deuteronomy, XXII, 22). This claim was included in the first 'Book of Discipline':

"Blasphemy, adultery, murder, perjury, and other crimes capital, worthy of death, ought not properly to fall under censure of the Church; because all such open transgressors of God's laws ought to be taken away by the civil sword."

The Lords of Congregation were required in the name of God to punish adultery as God had commanded:

"But the most perfect Reformation were, if your Honours would give to God his honour and glory, that ye would prefer his express commandment to your own corrupt judgments, especially in punishing of those crimes which he commandeth to be punished with death."<sup>2</sup>

The placing of responsibility for civil penalties on the State no doubt accounts for the lack of any act by the General Assembly anent adultery in 1560. The act anent incestuous marriages was

<sup>1</sup> 'A.P.S.'; II, 486.

<sup>2</sup> 'Bk.of Disc.'; 306, 317, 319.

different as this was defined as the Church's responsibility. The Reformers appear to have waited to see what would happen on the return of Mary as a supplication anent capital crimes was not made by the General Assembly until 29 June 1562. This may be related to the referral, on 4 March 1562, by the Superintendent and ministry of St.Andrews of William Bowsie to the baillies of Craill for punishment as a proven adulterer:

"according to the law of God, or at the lest according to the ordor resavit and usid within this realm in reformit burrowis; with certificacion to the saidis ballies, gif thai neclect thar execucion, it salbe complanit of thar parcialite and slewth to the suprem authorite".<sup>1</sup>

It is possible that the baillies did 'fail' in their duty, and that the matter was referred to the General Assembly. It is more likely, however, that this was of little significance, even if it did occur, as the language of the supplication shows the influence of the first 'Book of Discipline'. The petition was probably prompted by disappointment that Mary had not shown herself in the ten months since her return from France to be the Godly Magistrate envisaged by the Reformers. The second article of the supplication to the Queen and her Privy Council was that the Assembly required the

"punishment of horrible vices, such as are adultery, fornication, open whoredom, blasphemy, contempt of God, of his Word and Sacraments; which in this Realm, for lack of punishment, do even now so abound that sin is reputed to be no sin".

<sup>1</sup> 'K.S.Reg.St.Ands'(1):143.



Opposition to this must have been expected as the supplication included counter-arguments and threats of divine punishment

"If any object that punishments cannot be commanded to be executed without a Parliament, we answer that the eternal God in his Parliament has pronounced death to be the punishment for adultery and for blasphemy; whose acts if ye put not to execution (seeing that kings are but his lieutenants, having no power to give life, where he commands death), as that he will repute you, and all others that foster vice, patrons of impiety, so will he not fail to punish you for neglecting of his judgements."<sup>1</sup> No action appears to have been taken by the Privy Council, and the Reformers did have to wait until the next Parliament.

The Act anent adulterers passed in 1563 was a consequence of the change in the political situation. It was one of a number of Acts intended to appease the Reformers, and which implied statutory recognition of the Reformed Church. These Acts included the use of manse and glebes, and the repair of churches, but not the capital punishment of incest.<sup>2</sup> The preamble of the Act anent adulterers justifies the imposition of new penalties by painting a picture of long standing and unbridled abuses contrary to the Commandments of God. There is no suggestion that the Act was merely giving statutory ratification to existing penalties:

"the abominabill and filthy vice and crime of adulterie hes bene perniciouslie and wickitlie usit within this Realme in times bygane be sindrie liegis thairof havand na regaird to the commandementis

<sup>1</sup> Knox. 'Hist. of Ref.'; II, 49.

<sup>2</sup> Donaldson. 'Scotland'; 112.

of God bot to thair awin sensualitie and filthy lustis and plesoure thairrof".

To avoid the same thing happening in the future, Parliament ordained

"That all notoure and manifest committaris of adulterie in ony time to cum efter the dait heirof salbe punist with all rigour unto the deid alsweill the woman as the man doar and committar of the samin efter that dew monitioun be maid to abstene fra the said manifest and notoure crime And for uther adulterie that the actis and Lawis maid thairupone of befor be put to executioun with all rigour".<sup>1</sup>

The major innovation was the introduction of the death penalty, but this was qualified by its application only to 'notour and manifest' offenders, and by the recognition of existing penalties against other kinds of adultery. This was underlined by a clause in the Act which gave statutory recognition to divorce for adultery which had been viewed by the Reformers as a temporary expedient until all adulterers were punished by execution. The qualification of 'notour' was similar to that in the Act of 1552, and this Act of 1563 can be interpreted as replacing the penalty of horning by death, for unrepentant adulterous excommunicants. The other 'acts and laws' was probably a reference to enactments made by burgh councils and the Act of 1552. A double standard is not reflected in the Act as both offenders, male and female, were to be executed.

The narrow scope of the Act did not meet with the approval of the Church, or at least the more extreme elements. John Knox was one of these, and he dismissed this Act and other Acts passed by the same Parliament. He implies that the Lords of the Congregation were now

<sup>1</sup> 'A.P.S.'; II, 539.

looking after their own interests rather than those of the Reformed religion:

"The Act of Oblivion passed, because some of the Lords had interest; but the acts against adultery, and for the manses and glebes, were so modified that no law and such law might stand 'in eodem predicamento': to speak plain, no law and such Acts were both alike. The Acts are in print: let wise men read, and then accuse us if without cause we complain."<sup>1</sup> His use of the word 'modified' may imply that a draft of the Act anent adultery had been put before Parliament by the Church, or jointly with the Lords of the Congregation. This would explain the difference in style between the preamble and the enabling section, as the former is similar to the tone of the first 'Book of Discipline' and the General Assembly's supplication of 1562. Knox was aware that the restriction to 'notour' and manifest adulterers was a deliberate loophole, and it is equally clear that Parliament did not regard the crime of adultery as so horrendous as to be punished by death in every instance. MacKenzie says that the Act was intended only to punish the particular abuse of open cohabitation with other men's wives.<sup>2</sup>

Despite the disappointment felt by some ministers the General Assembly did take steps to ensure that the Act of 1563 was enforced. In the same month that the Act was passed, the Assembly ordained that supplications should be made to the Privy Council

"for constituting judges in everie province, to heare the

1 Know. 'Hist. of Ref.'; II, 79-80.

2 MacKenzie. 'Laws and Customs'; 171, (1678).

complaints of parties, alledging adulterie to be committed be the husband or the wife, and the said judges to take cognition in the mater, and punische according to the Act of Parliament".<sup>1</sup> Perhaps these supplications, or similar ones possibly made by later Assemblies, prompted the Privy Council eighteen months later on 11 December 1564 to issue a proclamation anent adulterers. It was complained that

"the filthie and abhominabill vice of adultre is frequentlie committit in this realme without feir of God, and but (little) regard of the Acts of Parliament maid ...".

The Council ordered that the Acts of 1552 and 1563 should be proclaimed at the market crosses of the head burghs of all Sherifffdoms, and that the Justic Clerk and his deputies should set diets for the trial of all persons suspected or accused, and to punish them according to the tenor of the Acts.<sup>2</sup>

This act of the Privy Council shows that the Act of 1563 did not replace that of 1552, and thus that incorrigible adulterers were still liable to be put to the horn.

The Church, however, was not satisfied by the results and made a similar supplication in 1565 which was to be presented to the Queen by the nobility present in the General Assembly.<sup>3</sup>

The supplication included other detestable crimes - for instance, incest, murder, prostitution - and the Queen in her answer to the next Assembly of December 1565 said that these scandals would be referred to the next Parliament.<sup>4</sup>

1 'B.U.K.'; I, 34.

2 'R.P.C.'; I, 298.

3 'B.U.K.'; I, 58.

4 'B.U.K.'; I, 60, 68.

The General Assembly had so far made no demand for the Act of 1563 to be amended so that all adulterers were punished by death. This may be due to the quality of the sources as Knox's continuator says that the supplication of 1565 included the request that

"committers of adultery should be punished according to the law of God and the Acts of Parliament".<sup>1</sup>

The Assembly did, however, try to take advantage of the political developments of 1567. The events of Kirk o'fields and Mary's marriage to Bothwell culminated in the battle of Carberry Hill and Mary's forced abdication on 24 July 1567. Mary had attempted to buy the support of the Church by rescinding legislation contrary to the Reformed Church and by taking it under her protection. The nomination of Moray as Regent to the infant James VI marked a political coup by the Protestant lords.<sup>2</sup>

The Church expected great things from the new government. Among the items on their 'shopping list' in the Articles of 25 July was

"that all crimes, vices, and offencis committit agains Gods law, may be severly punishit according to the word of God; and quher lawes are presentlie appointit for the punishment, and judges also to that effect deput, that the execution be made therupon as effeirs; and quher neither law nor judges are appointit for sick crimes as are to be punishit be the law of God, that in the first parliament the same judges may be appointit, laws establishit, as God commands in his word".<sup>3</sup> Applied to adultery this meant that the existing law of 1563 should be enforced and amended in the next

1 Knox. 'Hist. of Ref.'; II, 141.

2 Donaldson. 'Scot. Ref.'; 68. Donaldson. 'Scotland'; 128-129.

3 'B.U.K.'; I, 108.

Parliament so that all forms of adultery were made a capital offence. This is made a clear in the articles to be presented in Parliament by John Spottiswood, John Craig, John Knox, John Row, and David Lindesay (or three or four of them):

"That the act for puneishment of adulterie may be maid sa cleir that the offendaris delude not the law be the ambiguitie thair of". This article is annotated "Desiris this act to be clerit be the thre estaitis in parliament", and was remitted to the Lords of Articles. No Act, however, was passed by Parliament and this request by the Church was apparently blocked in the Articles.<sup>1</sup>

These events of 1567 show clearly that the Church could not impose its views on Parliament. Although an Act anent incest was passed in this Parliament, the penalties for adultery remained unaltered. It is probable that Parliament did not view adultery with the same sense of horror as the Church, and believed that death was too severe a penalty for most forms of adultery. Although all forms of adultery may have been equally sinful, they were not equally criminal. The failure of the Church in 1567 is particularly significant as it was one of the few occasions when Protestant extremists had control over the system of government, and therefore one of the best opportunities for their programme to be translated into statutory law. The General Assembly depended on lay sympathisers within the government and Parliament for the passing of Reformed laws, and these sympathisers were independent enough to withdraw their support from specific measures when their interests did not coincide with those of the General Assembly.

<sup>1</sup> 'A.P.S.'; III, 30, 38.

1567 marks a change in direction by the General Assembly as it appears to have turned its attention to reconciling the legislation against the crime of adultery with their view that divorce for adultery was a temporary expedient until adultery was punished by death. The particular issue was the remarriage of adulterers. It was not until after the acceptance of the presbyterian programme championed by Andrew Melville, that the General Assembly renewed its pleas for the capital punishment of adultery. The 'Second Book of Discipline' signifies a revival within the Reformed Church and a new attitude towards the State which reiterated the view that divine law and Scots law should be the same: the office of the Christian magistrate was "To mak lawis and constitutionis agreeable to Goddis Woorde".<sup>1</sup> The same Assembly that approved the new 'Book of Discipline' agreed to the eleventh item of a petition by the Synod of Lothian that

"Seing the Act of Parliament appoints them that are convict of notorious adulterie, and through the ambiguous exposition of this word Notorious, no execution is used therupon: Therefor for avoiding the plagues hingand above this haill countrie for this crime, That the Generall Assemblie wald crave that ane act may be made in Parliament for punishment of all persons to the death, quhosoevir are lawfullie convict of adulterie".<sup>2</sup> Parliament did pass an Act the following month, November 1581, but as in 1563 it was not the Act desired by the Church.

<sup>1</sup> 'B.U.K.'; II, 503.

<sup>2</sup> 'B.U.K.'; II, 536, 538.

The Act was entitled 'The explanatioun of the act tuiching the notoure and manifest comittaris of adulterie'. It did not widen the application of the death penalty as suggested by the Assembly. The preamble did take cognizance of their supplication but interpreted it to its own ends:

"Anent the supplicatioun maid ... craving ane explanatioun of the act ... anent adulterie: That is quhat salbe estimit and Judgit in law to be notoure and maifest adulterie worthie of the pane of deith mentionat in the said act."

The enactment defined notorious in three ways:

"quhair thair is bairnis ane or ma procreat betwix the personis adulteraris or quhen they keip companie and bed togidder notoriouslie knawin. Or quhen thay ar suspect of adulterie and thairby gevis sclander to the kirk quhairupoun being dewlie admonischit to abstene and satisfie the kirk be repentance or purgatioun and yit contempnandlie Refusand ar excommunicat for thair obstinancie." People lawfully convicted of any of these degrees of adultery before the Justice and his deputies were to incur and suffer the penalty of death.<sup>1</sup>

The third degree is derived from the Acts of 1552 and 1563, and the second degree from the Act of 1563 if MacKenzie is right in his opinion that it was intended only to punish open cohabitation by adulterers. The first degree is an innovation and reveals why Parliament thought some forms of adultery worthy of death. They were offended by open sinfulness and wished to support the censures of the Church, but were more concerned about the consequences of

<sup>1</sup> 'A.P.S.'; III, 213.



adultery. The birth of a child in adultery, particularly where the woman was the married party, raised questions of maintenance, succession, and paternity. The nature of these questions will need to be more fully discussed in the summary. The Act was a snub to the General Assembly. The Church was aware that 'notour' provided the opportunity for legal arguments and a loop-hole to undermine the application of the Act of 1563. Parliament was equally aware of this, and the Act of 1581 ratified this loop-hole and made sure it was narrowly interpreted.

The General Assembly appears to have accepted this rebuff - or there is a lacuna in the sources - as no attempts were made to amend the criminal law on adultery until the 1640's. Mention, however, must be made of the Acts of 1592 and 1600 anent divorce for adultery, which were discussed above (6.1.3). The Act of 1592 assumed that the marriage of a person divorced for adultery with their paramour was invalid, and enacted that her inheritance was reserved to the offspring, or her next in line, of the first lawful marriage. The Act excluded from possession her pretended husband and adulterer and their offspring, or any other person, to the hurt and prejudice of the heirs of the first marriage.<sup>1</sup>

The Act of 1600 declared invalid marriages between a divorced adulterer and the person named in the decree of divorce.<sup>2</sup>

This provision was evaded by not including the paramour's name in the decree. Both Acts were concerned with succession, especially where the adulterer was a married woman, and with the continued

1 'A.P.S.'; III, 543-544.

2 'A.P.S.'; IV, 233.

cohabitation of adulterers. To a certain extent they are complementary to the Act of 1581 which included adulterine children and cohabitation as two of its three definitions of notorious adultery. MacKenzie regarded these civil disqualifications as a punishment for adultery, and also as measures to discourage adultery by removing the expectation of marriage with the paramour.<sup>1</sup>

The four Acts of 1563, 1581, 1592 and 1600 were the basis of a settlement which was not questioned - at least in the sources used - until the 1640's. In 1644 an Act was passed anent divorce for adultery which changed the evidence required for a divorce. The effect of this Act was to bring more closely into line the evidence required in civil and criminal suits.<sup>2</sup>

Attempts were made to change the criminal law against adultery between 1644 and 1650.

On the same day as the Act anent divorce for adultery was passed, Parliament considered an Article proposed by the Commissioners of the Church for the execution of the Acts of Parliament against adulterers and incestuous persons. The overture was remitted to the Justice Deputes for them to consider if there was anything in the existing Acts which needed clarification, and to present their report for action by the next session of Parliament.<sup>3</sup>

The records do not show that any such report was made: certainly no action was taken in the next Parliament. It is not clear what the Church was seeking, though the phrasing does suggest that it was the application of the existing laws rather than any changes.

1 MacKenzie. 'Laws and Customs'; 182.

2 'A.P.S.'; VI, pt.I, 194.

3 'A.P.S.'; VI, pt.I, 199.

Another overture was made by the Commissioners of the Church in 1646. There must have been others made during the intervening two years as reference was made

"to the frequent desires of this kirk tendered to everie parliament and almost everie session of parliament".

The tone of the overture is one of increasing exasperation. Once again innovations were not sought, but only the revival of the existing Acts against adultery (and incest):

"That they may be suche sort revived and renewed as these odious sins yit so ryife and growne to suche a hight of abominatioune as is horride to express May be restrained and exemplarie punished and when these Lawis ar so established That some course may be authorized and enabled for executing of them in all the pairts of the kingdome".

Parliament's answer was to ratify the former Acts of Parliament without making any new measures to ensure that they were applied.<sup>1</sup> This clearly did not meet the demands of the Church, and not surprisingly another overture was made in the following year.

The overture of 1647 included bigamy, incest, charming, concealing of pregnancies, abortions, and adultery. The response was the same as that in 1644:

"Ordanis the justice generall and Mr James Robertoune and Mr Alexander Colvill justice deputtis To consider thir overtors and the offences therimentioned In thair severall kindis and degreis And what is to be done be the parliament for the strict restraint and condigne punishment of these offences and to report their

<sup>1</sup> 'A.P.S.'; VI, pt.I, 552, 553.

judgement theranents to the nixt session of parliament That the parliament have the better information how to proceed to the enacting new Lawis for executing justice upon suche offenders."<sup>1</sup>

No report has been traced. 'Justice' in the last clause probably refers to the existing law rather than the Biblical punishment of death. The repetition of the theme of enforcement makes it clear that there was opposition to the stricter application of the penalties against adultery, which was reflected by Parliament's ploy of setting up committees in 1644, 1646, and 1647 and the lack of any positive measures.

Some action was taken, however, between 1647 and 1649 as the Clerk to the Commission of the General Assembly reported on 14 March 1649 that the Acts anent adultery and incest were continued to the next session of Parliament.<sup>2</sup> It is possible that the Church had taken the initiative by setting up its own committee to consider the laws anent adultery to prevent the issue being evaded once again by the establishment of another committee by Parliament. The Commission of the General Assembly did certainly present a draft Act as on 7 June 1649 they appointed the Ministers of Edinburgh and any other Members of the Commission to present an Act concerning adultery.<sup>3</sup> The Act referred to by the Clerk in March may have been an earlier draft presented by the Commission in January 1649. An Act against incest was presented at the same time which was passed by Parliament on 9 July 1649. The Act anent adultery was less successful. The last reference to it is on 28 June 1650 when Parliament read and remitted to the several bodies (the Justice Deputes?) an Act anent the punishment of adultery by death.<sup>4</sup>

1 'A.P.S.'; VI, pt.I, 763.

2 'G.A.Commissions'; II, 241.

3 'G.A.Commissions'; II, 289.

4 'A.P.S.'; VI, pt.II, 593.

The Scottish Parliament had neither the time nor the opportunity to consider further the Act anent adultery even if they had wanted to. Cromwell crossed the Scottish border on the 22 July and the Scots suffered a major defeat at Dunbar on 3 September. Perth, the new seat of the Scottish government, capitulated a month later.

The content of this draft Act is not known. The only information which gives a clue is an overture to Parliament of 23 May 1650 by the Commission of the General Assembly on the reasons for punishing by death adultery with a single woman.<sup>1</sup> It is plausible that the Act was similar to that passed anent incest: an 'explanation' of the existing law, specifying the different kinds of offences. Perhaps the explanation took the form of replacing the 1581 definition of notour adultery, which was based on the nature of the evidence of adultery, by a list of the different degrees - for instance, married man and married woman, married woman and unmarried man, married man and unmarried woman. This in turn would imply an extension of the death penalty to all forms of adultery which would provide a reason for Parliament asking why adultery with a single woman should be punished by death. The Act would then be innovatory rather than an explanation of the existing law. This is more likely than an Act which only ratified the existing law as in 1646 or ensured that the law was enforced.

The Commission gave three reasons why capital punishment should be extended to the adultery of a married man with an unmarried woman, as well as of a married woman with a married or unmarried man. The first was that in both cases the party was equally guilty

<sup>1</sup> 'G.A.Commissions'; II, 411.

of adultery and therefore in both cases the punishment should be the same. The Commission was emphasising that it was the sin of adultery that was being punished and not its social consequences. The second was that parallel degrees of filthiness, as in incest, are punished as severely as those degrees expressly mentioned in the Bible. A single woman lying with a married man was the direct equivalent to a single man lying with a married woman. In other words, if there is scriptural justification for punishing by death one kind of adultery, all forms of adultery should be punished by death. The last reason was a refutation of an interpretation of Leviticus XX, 10, and Deuteronomy XXII, 22, as relating only to those relationships expressly mentioned in the text.<sup>1</sup> The need for the Commission to explain this to Parliament shows that there existed a double standard: the adultery of a married man was less serious than the adultery of a married woman. The Acts of 1563 and 1581 did not make this distinction, although the Act of 1592 is worded as if it only applied to adulteresses and is an expression of this double standard. The implication is that the criminal law was applied in a discriminatory manner against married women. This may be justified when adultery is considered in terms of its social consequences, but not when it is viewed as a sin which was the Commission's attitude.

The political upheavals of the 1640's had not resulted in any changes being made to the criminal statutes on adultery. Nor were any alterations made after the Restoration. The Acts of 1563 and

1 'G.A.Commissions'; 413, 414-415.

1581 were still valid, and only 'notour' adultery as defined in the latter was punishable by death under statute law.<sup>1</sup> It was not until after the re-establishment of 'presbyterianism' that any attempt was made to alter the sixteenth-century settlement. In October 1696 Parliament read for the first time the draft of an Act against adultery and ordered it to lie on the table. On the same day the same action was taken with an Act anent divorce for non-adherence.<sup>2</sup> Two years later, on 24 August 1698, Parliament read for the first time draft Acts anent the gifts of escheat upon adultery and divorce for non-adherence. Both were ordered to lie on the table, and no further action was taken on either. If the draft Acts of 1696 and 1698 were the same or similar, which is likely, the proposals concerned the profits of justice and not any substantive change in the criminal law.<sup>3</sup>

The only Act in this period which mentioned adultery was that against profaneness. This was read for the first time on 12 November 1700 and touched with the sceptre on 31 January 1701. The Act ratified, renewed, and revived all former Acts of Parliament against drunkenness, sabbath breaking, swearing, fornication, adultery and all manner of uncleanness. Specific reference was made to the ratification and revival of the Acts anent adultery of 1563 and 1581, which had not been mentioned the previous statutes against profaneness. This was not associated with the drafts of 1696 and 1698 which were probably concerned only with the administration of the royal revenue from successful prosecutions under the earlier Acts.<sup>4</sup>

1 MacKenzie. 'Observations'; 166-167. (1686)

MacKenzie. 'Laws and Customs'; 170-184. (1678)

2 'A.P.S.'; X, 67.

3 'A.P.S.'; X, 146.

4 'A.P.S.'; X, 214, 223, 235, 240, 272, 279-280.

The Reformation settlement of the criminal law on adultery was unaffected by the political and religious upheavals of the seventeenth century. The Acts of 1563 and 1581 remained the only statute law anent adultery. This is similar to the law on incest except that there was no equivalent to the Act of 1649 anent incest. Only 'notour' adultery was a statutory offence and this distinction predated the Reformation. The Act of 1581 included as one of its three definitions of 'notour' the incorrigible adulterer penalised by the Act of 1552. One date does not fit into the pattern of legislation when Protestant extremists were in power. 1581 rather marks the opposite - the conservative lay members of the government took the opportunity presented by a petition from the General Assembly to pass an Act which made clear the limitations on the application of the death penalty. Throughout the period the Church was faced by opposition to the idea that all forms of adultery were equally criminal as they were equally sinful. Rather there was a distinction made between different kinds of adultery which was also reflected in the statute law on divorce for adultery. This was based on the social consequences of adultery and not on verses in Leviticus or Deuteronomy. There was clearly a limit to the Church's power and its ability to convert people to their moral views, and they failed to achieve "the most perfect Reformation" envisaged in the first 'Book of Discipline'.

### 8.3. The application of statute law.

The promulgation of a law does not imply that it will be enforced and applied in the intended manner. This is particularly likely to occur in societies where the legal structure is not well developed and where only weak control can be exerted by the central government which made the law. In sixteenth and seventeenth



century Scotland the government had difficulty in maintaining order yet alone ensuring the regular and uniform application of the laws of the kingdom. This applied to the Acts anent 'notour' adultery as well as other edicts, and it is not therefore surprising to find complaints about the ineffective or partial application of the statutes. For instance in 1564 the Privy Council ordered the proclamation of the Acts of 1551 and 1563 at the market crosses of the head burghs of all Sheriffdoms that none pretend ignorance.<sup>1</sup> In 1576 the Privy Council complained that people indicted of adultery (and incest) at justice ayres

"could not convenientlie be puneist according to the tennour of the saidis Actis of Parliament, bot thair persute and punisement of necessitie hes stayed and behuvit to be continewit, be ressoun the ordour and admonitionis of the kirk appointit to proceed ar not dewlie usit be the ministerie".<sup>2</sup>

The situation did not improve after the explanatory Act of 1581. The failure to apply the law against 'notour' adultery was used in the preamble to the Act of 1592 to justify further penalties against the marriage of divorced adulterers:

"Forsamekle as albeit be diverse actis and constitutionis maid of befoir it wes statute and ordanit That adultery notour and manifest sould be punishit be death Quhilk nevirththeless hes not yit bene put to dew executioun Be occasioun quhairof the crime of adultery daylie increse And for the samyn ane grite nowmer of mayit personis hes bene devorceit".<sup>3</sup>

1 'R.P.C.'; I<sup>1</sup>, 298.

2 'R.P.C.'; I<sup>1</sup>, 499.

3 'A.P.S.'; III, 543.

These complaints are unexceptional: what makes adultery unusual is that there is the possibility that the non-application of the law is deliberate rather than just the consequence of a weak legal system. Very few cases have been found of executions for 'notour' adultery, excluding cases compounded by other capital offences or prosecutions against non-notour adultery. This is particularly noticeable in Sir George MacKenzie's 'Observations on the Acts of Parliament' where he does not cite a single case.<sup>1</sup> In his much longer discourse in 'Laws and Customs', he does however cite 6 cases which bear closer examination as in none of them is the person actually executed only for 'notour' adultery. The doom of death was pronounced on Sir John Stewart in August 1628 for three adulteries (not 'notour'), but it should not be assumed that he was executed. Isabel or Grissel Hamilton was executed in 1649 but this was for returning to Scotland after being exiled under pain of death in July 1647 for adultery. Jeals Thyre only was banished although his crime was aggravated by other offences and MacKenzie says that 'notour' adultery might have been proved and that he deserved to die. John Reidpath was sentenced to death in 1662 for double adultery but again he was banished and not executed. John Frazer was found guilty of bigamy but secured a remission. In only one case does MacKenzie say that the offender was executed: in May 1646 Margaret Thomson was executed for committing adultery with a minister, and falsifying a testimonial so that the child could be baptised. It is clear that this was not for 'notour' adultery as MacKenzie uses it to show that ordinary adultery aggravated by other crimes could be punished by death.<sup>2</sup>

1 MacKenzie. 'Observations'; 166-167.

2 MacKenzie. 'Laws and Customs'; 170-181.

That these cases are not unusual is supported by the few cases which have been traced in other sources. The sparcity of other evidence may in itself be significant, although this could be a reflection of a bias among editors and contemporary commentators to select the more abominable crimes of incest, sodomy and bestiality, or to select cases where the doom of death was changed because this was unusual. Cuthbert Amullekine was found guilty by an assize in 1578 of adultery after being admonished to abstain. He had been found guilty of a similar offence in 1570. The offence came within the definition of 'notour' adultery and was compounded by his wasting away of the husband's property. The Privy Council ordered that he should be banished from the realm and pay a security of 1,000 merks not to commit adultery again.<sup>1</sup> Three people were convicted of adultery in 1617. Alexander Thomson and Janet Cuthbert were sentenced to death, but this was changed by a warrant from the King. Thomson was banished under pain of death from all of his Majesty's dominions, and Cuthbert banished under pain of death from Edinburgh and its neighbourhood (12 miles radius). The third person was executed. John Guthrie was prosecuted for 'notour' adultery at the express command of the King by the King's advocate. He had deserted his wife in Forfar and had remarried in Leith after changing his name from Laird to Guthrie. Bigamy was compounded by adultery with a third woman whom he kept as his concubine. He was sentenced to be hanged at Edinburgh. The royal warrant had ordered his execution on conviction as his crimes were "so odious and intollerable amongst Christianes, and mereiting to be most exmplaire puneished".<sup>2</sup> The last case is in 1636 when Janet

1 Pitcairn. 'Crim Trials'; I, 12, 13, 78, 80.

2 Pitcairn. 'Crim. Trials'; III, 428-429

Arnot. 'Celebrated Crim. Trials'; 312-313.

Davidson was found guilty of bearing several children in adultery. The Privy Council ordered the Justice to pronounce the doom ordaining her to be scourged through the burgh of Edinburgh, branded on the cheek, and banished the kingdom under the pain of death.<sup>1</sup>

This rather scrappy evidence is not sufficient in itself to prove that people convicted of 'notour' adultery were rarely executed. The Acts of 1563 and 1581 never fell into desuetude during the period under study, although this argument was used as a defence in a trial of 1598. Alexander Hay argued that

"the saidis Actis of Parliament hes nevir bene 'in virdi observantia', nor yit ony persoun putt to ony triell, nather man nor woman, and sua of the Law 'contraria dissuetudine tollitur', according to the Commoun Law, 'quia et multis peccatum manet impunitum'".

The advocate argued that the contrary was shown "be infinit examples extant in the Adjornall buikis". The Justice repelled the panel's defences and he was acquitted of one charge of adultery, but no mention is made of the other two. He was, however, accused on a further charge of adultery three months later. What happened to him in the end is unknown.<sup>2</sup> However, the death sentence was sometimes commuted to banishment. As a hypothesis to be tested by further research it is suggested that:

1. people convicted of 'notour adultery' normally had the doom altered;

1 'R.P.C.'; VI<sup>2</sup>, 354-355.

2 Pitcairn. 'Crim. Trials'; 46-47, 49, 51, 52, 64, 130.

MacKenzie. 'Laws and Customs'; 179.

2. people were more likely to be charged with single adultery than 'notour' adultery even where there was evidence of 'notour' adultery;

3. prosecution was more likley when the woman was married, or when adultery was aggravated by other offences;

4. the courts considered the social consequences of the crime rather than its sinfulness.

The latter appears to be the reason for commuting Reidpath's sentence of death as MacKenzie says that the Privy Council gave consideration to the fact that

"Tinkers are in effect vile persons, who are seldome ever lawfully married ... and the absurd custome amongst Tinkers, of living promiscuously, and using one anothers Wives as Concubines".<sup>1</sup>

It is also suggested that it was difficult to secure a conviction on the charge of 'notour' adultery because of the nature of the evidence required. This may imply that a charge of single adultery was preferred as being easier to prove.

The third degree of 'notour' adultery as explained in the Act of 1581 was when persons suspected of adultery, who had been admonished on the grounds of giving rise to slander by the Church to abstain and make satisfaction either by repentance or purgation, refused to do so and were excommunicated for their obstinacy. The kirk sessions and, later, presbyteries were therefore required to prove that this process had been administered correctly if a person was to be prosecuted in the third degree. The Church could not require

1 MacKenzie. 'Laws and Customs'; 174.

'Just. Court'; I, 54, 55.

satisfaction if an action was pending in the civil or criminal courts. Thus in 1599 the Privy Council forbade the Presbytery of Coupar to proceed against Elizabeth Pitcairne until after the suit for non-adherence against her husband had been heard by the Commissary Court of Edinburgh.<sup>1</sup> More important is the series of decisions made by the Privy Council in 1605 which suggest that the Church could not demand satisfaction unless adultery had been proved in the civil or criminal courts. The point at issue was that repentance for adultery would prejudice any subsequent prosecution. The Privy Council, for instance, decided in a suit brought by the spouse of Ralston that the Presbytery of Paisley

"could not compell hir to give hir aith nor excommunicat hir for not geving thair of, and could proceed na farther bot to urge hir to ane grant or deniall".<sup>2</sup>

A decision in the same year by the Privy Council made it clear that the Church could only try the slander of adultery and not the crime of adultery.<sup>3</sup> The processes of the Church courts could not be used as evidence of guilt in criminal trials for adultery: they only provided the grounds for the charge of 'notour' adultery which had to be heard according to the rules of the criminal court. There was the danger of the charge being dismissed if the Church courts had not restricted themselves to the offence of slander, or had not followed the correct procedure.

1 'R.P.C.'; VI<sup>1</sup>, 272.

2 'R.P.C.'; VII<sup>1</sup>, 52, 130.

See also 'R.P.C.'; VII<sup>1</sup>, 66; VIII<sup>1</sup>, 92.

3 'R.P.C.'; VII<sup>1</sup>, 145-146.

MacKenzie also mentions some of the difficulties in proving the charge of 'notour' adultery. For instance, a decree of divorce on the grounds of adultery by the civil courts was insufficient evidence for 'notour' adultery, though he does argue that such a decree would be sufficient for a charge of single adultery. He also says that a common fault committed by the pursuer was failure to produce witnesses to prove the existence of a marriage, which was strictly necessary to prove a charge of adultery. There was also doubt as to whether the accused could be found guilty of single adultery if the evidence fell short of proving 'notour' adultery. MacKenzie argues that the assize should only file on the libel before the court, as single and 'notour' adultery are different crimes.<sup>1</sup>

The impression is that the statutes on 'notour' adultery were rarely applied, and that this may be partly explained by the difficulty of proving the charge in the criminal courts. There may have been a preference to file people for single adultery as it was easier to secure a conviction. This may reflect a difference in attitudes to adultery between statute law and society. The phrasing of the Act of 1581 is such as to imply that the Magistrates were required to pronounce the sentence of death on people convicted of 'notour' adultery, rather than just empowering them to do so.<sup>2</sup> People may have been loath to pursue offenders for 'notour' adultery or to convict them if few believed that adultery as a crime warranted the death penalty. The capital penalty was perhaps kept in

1 MacKenzie. 'Laws and Customs'; 175, 179, 181-182.

2 MacKenzie. 'Laws and Customs'; 173.

'A.P.S.'; III, 213.

reserve for exceptional cases which deserved to be punished severely.

#### 8.4. Civil penalties for single adultery.

The Acts of 1563 and 1581 did not preclude capital punishment for non-'notour' adultery. MacKenzie cites as an example the case of Sir John Stewart who was sentenced to death in 1628 for three adulteries, and concludes that

"since there are other cases more grievous [than 'notour' adultery] to the party injured, and more scandalous to the Commonwealth; it may be argued, that the punishment of death should likewise be extended to them".

He also quoted the case of Margaret Thomson who was executed in 1646 for single adultery aggravated by other offences.<sup>1</sup> Certainly single adultery was pursued capitally after his work was published. In 1699 John Murdoch and Janet Douglas, both married, were tried capitally for one act of adultery at the instance of the King's Advocate, although they were banished under pain of death after throwing themselves upon the King's will.<sup>2</sup> Death was, however, an exceptional punishment and

"it appears that the punishment of ordinary Adultery is arbitrary, and useth to be inflicted, either by banishment, whipping, fining, or imprisonment".<sup>3</sup>

1 MacKenzie. 'Laws and Customs'; 172, 174.

2 Arnot. 'Celebrated Crim. Trials'; 318.

3 MacKenzie. 'Laws and Customs'; 174: see also 173.



It should also be remembered that adultery was comprehended under the term fornication ie. illicit intercourse. It is therefore possible that adulterers were liable to the penalties laid down in the 'Act anent the filthie vice of fornication, and punishment of the samin', passed by Parliament in 1567. It is probably this legislation which is alluded to in a section on civil remedies in an Overture of 1648 against grievous and common sins of the land. The Overture was approved by the General Assembly. It recommended that, until the Overture was prepared for presentation to Parliament,

"each magistrate in every congregation exact and make compt to the Session of fourty pounds for each fornicatour and fornicatrix, of an hundreth merks for each one of their relapse in fornication, of an hundreth pounds for each adulterer and adulteress, according to express Acts of Parliament".<sup>1</sup>

These sums are the same as those specified in the Act of 1567, adultery being equated to trilapse in fornication. The Act gave the alternative of 24 days in prison on bread and water, followed by a triple ducking in the deepest and foulest pool available, for those failing to pay the £100. After payment or corporal punishment the offender was to be banished from the town or parish forever.<sup>2</sup>

The two following sections discuss the punishment of single adultery. The first deals with material relating to the central government - individual cases dealt with by the criminal courts and the Privy Council's instructions to Justices on the punishment of adulterers. The acts passed by burgh councils are described in the second section, especially with reference to Edinburgh in the 1560's.

1 'G.A.Acts'; 192, 194.

2 'A.P.S'; III, 25-26.

#### 8.4.1. Central government.

On a few occasions actions involving single adultery were heard by the Privy Council. In 1616 an action was brought by the Kirk Session of Edinburgh against Thomas Kennedy who had publicly confessed to adultery with Margaret Rous. The Session's problem was that Kennedy, a

"counterfait and fenyeit foole will mock and scorne gif he be brocht to the place of repentance".

It was said that the magistrates of the Burgh could not inflict corporal punishment either, presumably because there was insufficient evidence for the parties to be tried. It was therefore possible that Kennedy and Rous might escape punishment "to the offence of God and Sclander of the Kirk". The Privy Council ordered that both of them should be tied to a cart and whipped through the streets of Edinburgh. This was the normal punishment under burgh law (see below) and the Council acted to ensure that Kennedy and Rous did not evade punishment.<sup>1</sup>

In the case of John Guild in 1627 the Privy Council intervened because he was already in ward for riot against the supplicant. The Council ordered that Guild should be sent to the wars in Germany as guilty of both adultery and theft.<sup>2</sup> Later that same year the Privy Council ordered Andrew Davidson to appear before them as he had returned to Annandale after he had been remitted from trial for adultery on the promise that he would go to the wars in Germany under Lord Spynie and banished himself from Annandale. He was declared a rebel for non-appearance.<sup>3</sup> The last case involving corporal

1 'R.P.C.'; X<sup>1</sup>, 467-468.

2 'R.P.C.'; VIII<sup>2</sup>, 410-411.

3 'R.P.C.'; II<sup>2</sup>, 162, 184, 463-464.

punishment was heard in 1664. Janet Brown had previously petitioned the Council to be set at liberty following the assise's verdict of not guilty on the charge of notorious adultery. The petition before the Council sought the rescission of their order that she should be whipped. It was argued that

"such an ignominious gesture would procure nothing less than her everlasting disgrace and be the mean of the utter ruine of her and her poor fatherless children".

The Council changed their previous decision and ordered her to pay 100 merks for the use of the poor, and to satisfy the Church. She was to be set at liberty after she had found caution.<sup>1</sup> The fine was the same as that laid down in the Act of 1567 for a second offence of fornication.

In these few examples the Council was acting as a court of appeal, or was already involved as in 1627. The fact that the cases concerned adultery was of no special significance, and the Council's punishments were unexceptional. Whipping, banishment and fining were normal punishments for adultery. This is illustrated by some of the published cases of the Justiciary Court. For instance, in 1639 John McCarrall agreed to be banished under pain of death, and to depart in the company of Colonel Alexander Erskine and to serve him as a soldier in foreign wars.<sup>2</sup> Similarly in a case before the Synod of Fife in 1666, it was noted that the woman had already been sent to Barbados.<sup>3</sup> Banishment was again the punishment for Elizabeth Mure in 1668 who had borne two children in adultery in England.<sup>4</sup> Exile did not necessarily mean

1 'R.P.C.'; I<sup>3</sup>, 549-550.

2 'Just. Cases'; II, 379.

3 'Synod of Fife'; 184.

4 'Just. Court'; I, 292, 294, 295.

banishment from Scotland, or transportation: it could be restricted to a burgh or parish as for trilapse fornication under the Act of 1567 anent fornication. For instance, in 1602 the Justice found David Gray and Elspeth Hislope guilty of adultery, and ordered them to be

"kairtit throw the Toune, and ane paper upone thair heid, contening thair crime: And to be banischit the said burgh [Edinburgh]; and nocht to return thairin, during all the day is of thair liftime, under the pane of deid".

David Gray had already been fined £40 for the use of the Kirk, which was the same amount as the fine for fornication.<sup>1</sup> Whipping as a penalty is illustrated by the case of Richard Brown and Helen Geddes, both of whom were in jail, probably for adultery. They were ordered not to keep company together under pain of death, to satisfy the Church, and to be freed after being whipped in prison.<sup>2</sup>

An alternative to corporal punishment was fining. The Act anent fornication, for instance, makes it clear that corporal punishment was applicable to those either unable or unwilling to pay the fine. It would not be surprising if adulterers were fined instead of being whipped as in the example above of Janet Brown in 1664. Furthermore, there is evidence which suggests that in the first half of the seventeenth century fines for adultery were used regularly to augment royal revenue and to repay royal debts.

The King's personal interest and the connection with Crown revenue is made clear in the first reference to this practice. In 1614 James VI wrote to the Privy Council and the Commissioners for the management of the royal rents appointing the

1 Pitcairn. 'Crim. Trials'; II, 369, 401.

2 'Just. Court'; I, 3.

"vice of adulterie to be punisheit by imposing of a fine, or composition for pardoun, upoun suche as salbe dilaitit and convict thairof, and the just thrid of the said fine and composition, or suche uther portioun thairof as salbe thoght most fitte be the saidis Lordis, to be given to the discoverair, and the rest to be converted to his Majesteis use".

He complained that adultery had become common because the Acts of Parliament had not been enforced. The reward to the informer can be interpreted as an encouragement to enforce the law. But this was only a secondary motive, as the Privy Council and Commissioners appreciated, because the matter was remitted by them to the Treasurer's Depute and not to the Justice Clerk, with the proviso that not more than a third of the fine was to be paid to the delaters "for thair panes and travellis in that mater".<sup>1</sup>

A similar reason was given in 1616 in the Commission under the Signet for one year to the Justices of the Middle Shires. It was said the filthy crime of adultery had become very frequent and common, and they were empowered

"to compone with those found guilty, either before or after conviction, for the royal remission under the great seal, and to denounce as fugitives those who do not appear and proceed against them accordingly".<sup>2</sup>

All profits of justice were to go to the King. The reference to composition before conviction reads as if the accused was assumed to be guilty before being tried. This Commission shows clearly that royal clemency was for sale.

1 'R.P.C.'; X<sup>1</sup>, 283.

2 'R.P.C.'; X<sup>1</sup>, 477.

Informers is not really the correct word to describe some of the people who received a portion of the fines. The money was in payment of a royal debt on at least one occasion. In 1619 the Privy Council made an act empowering Jerome Lindsay to institute prosecutions for adultery throughout Scotland, and to receive one half of the fines until he had received £3,000. This was the amount owed by the King to David Lindsay, late keeper of Edinburgh Tolbooth, which had been assigned by him to Jerome.<sup>1</sup> A similar explanation probably applies to the commission given to John Crawford for a third part of the fines for adultery. This occurs in the records because the Privy Council and Commissioners of the royal rents heard a complaint by Crawford that he had not received a third of Sir Donald McKay's remission of 2,000 merks. It is made clear that Sir Donald had not been convicted or even tried - "the persute intendit be the said Johnne aganis the said Sir Donald movit him to tak the said remission".

The Treasurer was ordered to pay the money to Crawford.<sup>2</sup>

The practice of fining adulterers was continued in the reign of Charles I and became an accepted practice. The references, however, are not detailed enough to show how the profits of royal justice were assigned. For instance, in 1629 the list of crimes to be tried by the circuit courts of the Justices included adultery and bigamy. The Justices were to try the accused, punish them by the imposition of "pecuniall soumes and fines ... allanerlie", and to take caution that they satisfy the Church.<sup>3</sup> A similar commission was granted two years later.<sup>4</sup> This appears to have become a regular practice as, in a

1 IR.P.C.'; XI<sup>1</sup>, 498.

2 'R.P.C.'; XII<sup>1</sup>, 293.

3 'R.P.C.'; III<sup>2</sup>, 258-259.

4 'R.P.C.'; IV<sup>2</sup>, 192.

letter from Charles appointing a new Privy Council in 1631, they are empowered

"to give warrand to the said Justice Generall his deputs and others commissioners foresaids for imponing of fines or pecuniall soumes upon the crimes of adulterie".<sup>1</sup>

It is likely that fining was a standard punishment for single adultery, and that in the early seventeenth century these fines were exploited as a source of royal revenue and to pay Crown Debts. It is not clear if the practice was continued for the rest of the century. Fines were levied during the English occupation - at the Justice Ayr of Stirling in 1652 the penalty was £5 sterling (£60.).<sup>2</sup> These proceedings were recognised as valid after the Restoration under an Act of Parliament of 1661 which ratified all judicial proceedings during the usurpation. In the published Justiciary records the English fines are described as less than the law prescribes without saying what the penalty should have been.<sup>3</sup>

An important aspect of this published material is that cases of adultery very rarely merited the Privy Council's intervention. This is in contrast to the large number of commissions granted for the trial of infanticide or incest. The punishment of adultery was left to the lower courts, and when the Privy Council did become involved the panalties were of the same kind - banishment (burgh or country), whipping, fining. Single adultery was not as serious a crime as incest, sodomy or bestiality.

1 'R.P.C.'; IV<sup>2</sup>, 189.

3 'Just. Court. '; II, 53-55, 57-58.

2 Lamont. 'Diary'; 47.

Firth. 'Scot. and Commonwealth'; 367-368.

#### 8.4.2. Burgh laws.

The published records of the burghs of Aberdeen, Peebles, Stirling and Edinburgh were examined to find burgh laws against adultery. No specific laws were found. This negative evidence should not be used to argue that such laws did not exist or that punishments were not inflicted by burghs. The main reason is that probably adultery was not seen as a discrete offence but was one of many offences comprehended under laws against immorality, harlotry and fornication. For instance, Edinburgh's law of 1560 is entitled 'anent idolaters, whoremasters and harlots'. This section deals exclusively with material where adultery is specifically named as the offence, and the laws against fornication, harlotry, etc., are considered below (see 9.1.)

The result of this analytical distinction is to restrict the present discussion to the controversy concerning the punishment of John Sanderson of Edinburgh in 1560, and some additional material up to 1566 also from the Burgh records of Edinburgh. There are some other references but these are of little significance. In 1562, for instance, the Burgh of Stirling ordained that John Cameron would be punished to death if he broke his promise to abstain from the company of Janet Gourlay with whom he had committed double adultery.<sup>1</sup> In 1581 the Privy Council heard a complaint from John Deuchar that his freedom of the Burgh of Aberdeen had been withdrawn in 1578 by the provost and baillies for slandering them after he was excommunicated by the Kirk Session of Aberdeen in 1568 for refusing to make his repentance for adultery. The case was already before

1 'Burgh Recs. Stirling'; I, 80.



the Court of Session and the Privy Council remitted the matter to them.<sup>1</sup>

The act of the Burgh of Edinburgh of 1560 and the case of John Sanderson is often referred to by modern writers. This is mainly because John Knox included it in his 'History of the Reformation'. It is worth quoting his comments in full as he was in Edinburgh at the time and his description outlines the main events;

"There was a law made against fornicators and adulterers, that the one and the other should be carted through the towns, and so banished, till that their repentance was offered and received. And albeit this was not the severity of God's law, especially against adulterers, yet was it a great bridle to malefactors; whereat the wicked did wondrously storm. It chanced that one Sanderson, a flesher, was deprehended to have put away his lawful wife (under colour that he was lawfully parted after the manner of the Papistical religion), and had taken to him another in [his] house. The complaint being slander [being] proponed to the Kirk, and trial takin that he was not married with the second woman, neither that he was able to prove that he was divorced by any order of law from the first, he was committed in the hands of the Magistrates who, according to the laws, commanded him to be carted. But the rascal multitude, inflamed by some ungodly craftsmen, made insurrection, broke the cart, boisted the officers, and took away the malefactor".<sup>2</sup> Knox gives the impression that the law was a novel one that was opposed by the wicked and ungodly, and he uses the incident to illustrate the difficulties faced by

1 'R.P.C.'; III<sup>1</sup>, 433.

2 Knox. 'Hist. of Ref.'; 355-256

Reformers in securing the death penalty for adulterers. The fact that Sanderson was not married under Canon Law is mentioned only in passing.

The act referred to by Knox was passed on 10 June 1560 anent idolators, whoremasters and harlots by the provost, baillies, council and some of the deacons of crafts. It was ordained that a proclamation should be made that

"all sic personis cum in presens of the minister or the elderis to gif testimonie of thair conversioun for the saidis abusis respective betwix and Sunday at none nixttocum, or falyeing thair of the saidis idolatreris to be diffamit be setting thame upone the merkatt croce thair to remane for the space of vi houris for thair first falt, carying of the saidis borderlaris houremaisteris and harlottis throw the toun in ane carte for thair first falt, birnying of baith the kindis of the saidis personis on the cheik for the second falt, and banisching the toun, and for the thrid falt to be punischit to the deid".<sup>1</sup>

The reference to capital punishment and the comprehension of Papists and sexual offenders reveals clearly that the Burgh Council was 'reformed'. Reference was also made in the preamble to the indignation of God which had "ofttimes furtheschawin be the prechouris". It was intended to purge the town in which the 'Reformation Parliament' was sitting - Parliament abolished Papal jurisdiction in the same month - and which was to host the first 'General Assembly' or 'Convention of Reformed Congregations' in December. This act was one of several which marked the political control of the Burgh of Edinburgh by the Reformers. The case of John Sanderson was used to reinforce this authority, with the assistance of the Privy Council.

1 'Burgh Recs. Edin.'; III, 65.

Sanderson was sentenced to carting and banishment some time before the 22 November 1560. On that day the deacon of the Hammermen and other craftsmen requested that the sentence be continued until the following day. This was granted. On the next day the Burgh Council required the aid of all the deacons of the crafts in carrying out the sentence. They

"all in ane voce disassentit that ony sic executioun sould follow upoun him be the said ordinance, and that on na wayis thay wald appreve the samin nor na sic extreme lawis upoun honest craftismen".

It was also requested by a wright and saddler that John Sanderson should be freed under caution. This was refused by the Council. Later that day the Burgh Council ordained that a complaint should be laid before the Privy Council as Sanderson had been forcibly freed from ward by "certane young fallowis, craftismennis servandis". He was freed from prison and not during his punishment as described by Knox. The records of the Privy Council for this period survive only in part, and this case is one of those missing. It is known, however, that some deacons were imprisoned in Edinburgh Castle.

The conclusion of the dispute was reached in meetings of the Burgh Council on 28 November and 6 December. It is clear that all the deacons were now Reformers, and not just some as in June, and that the opposition to the Reformers had been broken. The deacons promised on behalf of all the crafts to obey and maintain the authority of the Council, and desired that the

"wikit memberis quhilkis hes rowsit at this our lait variance may be expellit and rutit out frome amangis us to thair uter confusioun, and that it may be knawyn amangis the godlie that in this toun it hes plesit the Almychti to place and establische sic

ane kirk quhilk be his omnipotent power, in despite of Sathan, sall so be jointit in sic godlie ametie that the samin salbe mirrow and exampill to all the rest of this realme".

The Reformers were now fully in control of the Burgh Council. This dispute was also used to remove at least one of the privileges of the crafts - they no longer had the right to appear before the Council as a body if one of their members was summoned for breaking a law.<sup>1</sup>

There are several reasons why this case is interesting apart from the light it sheds on the political progress of the Reformation in Edinburgh and on the shifts of power within the Burgh Council. The punishment of adultery (and other sexual offences) was as much an integral part of the Reformation as the punishment of idolators. Both were transgressors of God's word, and offenders were to be purged. There was opposition - the deacons described as extreme the law under which John Sanderson was punished. It was, however, difficult to justify opposition to the severe punishment of adultery without being described as ungodly or wicked, particularly as sexual epithets such as harlot of Rome or whore of Babylon were used to describe the Scottish Church. Sexual irregularities were used for political advantage, both to blacken the image of the traditional Church and to subordinate the crafts to the Burgh Council of Edinburgh. Secondly, the Burgh had the right to exact the death penalty for adultery (omitted by Knox) - the Act of Parliament of 1563 did not mean that adulterers were not executed before it was passed. Also adultery was not punished by a specific law anent adulterers but included under

1 'Burgh Recs. Edin.'; III, 89-95.

an act against whoremasters and harlots. Whore and harlot did not always have the specific meaning attached to them now - the nearest modern equivalent would be sexual offenders. An adulteress could be described as a harlot and her lover as a whoremaster even though no payment was made.

The early success of the Reformers in partially converting the Burgh Council to their views on adultery soon waned as the law of 1560 was replaced in November 1562 by one which did not include the death penalty. Measures were also taken to ensure that the law was enforced as the new act was justified by the assertion that adultery and fornication daily increased for lack of punishment. The Council ordained that the baillies

"mak deligent triale throw all the pairtis of the town quhair any fornicatour or adulterar may be apprehendit, man or woman, without exceptioun of persoun, to be takin and put fast in the irnehous, and thair to be fied be the space of ane moneth with breid and water allanerlie, and thaireftir upoun the sure triale offens to be baneist the toun for evir; and siklike the fornicatouris apprehendit in the vice or utheris tryet be ordour, baith the man and the woman, to be skurgeit thair at the cairt ers and banisht the toun ay and quhill sume sure apperance be harde to the kirk and magistratis of the amendiment of their lifeis; and this ordour to be observit within this burgh as it sall pleis the Almightie to move the hartis of the hierar powertis to statute ane better law for the saidis crimeis".<sup>1</sup>

1 'Burgh Recs. Edin.'; III, 152.

The two different forms of punishment - imprisonment and banishment for life, scourging and banishment until repentance - relate to two different offences. The basis of the distinction is not clear, although the imprisonment may be for adulterers and the scourging for non-adulterous fornication. However, when the Council took steps to provide a prison within the church a month later, and again in November 1563, it was said to be for both adulterers and fornicators.<sup>1</sup> Imprisonment is more likely to refer to the period between apprehension and trial, but the meaning of the distinction between "sure triale offens" and "apprehendit in the vice or utheris tryit be ordour" is not known. Carting and banishment were included in the act of 1560, but this act of 1562 omits the punishment of branding and death, and does not include more severe penalties for the repetition of the offence. The reference to a "better law" probably alludes to the supplication made by the General Assembly in the previous June.

This is the last act in the Burgh records up to 1589 which is known to include adultery as an offence, although there were other acts relating to harlots and fornication which are discussed below. The effectiveness of the act can be doubted as John Craig, a minister of Edinburgh, complained to Mary in 1566 that

"adultre, furnecatioun, oppin harlatrie, and utheris sic filthe lusts of the flesche, ar committit and sufferit in Edinburgh without ony puneisement".

The Queen ordered the Burgh Council to search out such offenders from time to time, and to punish them according to the Act of the last parliament.<sup>2</sup> This must be a reference to the Act of 1563 anent

1 'Burgh Recs. Edin.'; III, 154, 173-174.

2 'Burgh Recs. Edin.'; III, 217: see also 223.

'notour adultery'. Obviously the kirk session, or at least its minister, was not satisfied with the application of the law by the Burgh Council.

There were many other burghs in addition to Aberdeen, Peebles, Stirling and Edinburgh so that it would be unwise to make generalisations on the basis of only these four. However, it is significant that in these burghs, especially Edinburgh and Stirling, which both had 'reformed' congregations by 1560, the published records do not show any specific burgh laws anent adultery. The clear inference is that the burghs punished adultery either arbitrarily or under acts against harlotry, etc. The case of John Sanderson shows how an adulterer was sentenced under a law which referred only to idolators, whoremasters and harlots. In these burghs the councils did not separate sexual offences into different categories, graded according to their seriousness, and each with their own appropriate penalties. Such distinctions may have been made by selective prosecution and sentencing, if in fact different offences were punished differently. This may be due to the way councils regarded the purpose of such laws: a general statement of principle, for example illicit sex is to be civilly punished, with the penalties cited as examples or as the most severe punishment to which offenders were liable. As regards adultery in particular, a specific law might have meant that both men and women would be subject to the same penalties. Councils may have wished to avoid this if they regarded the adultery of a married man as less serious than that of a married woman. There is a difference between the Church's attitude to adultery as a particular crime and the burgh laws which do not distinguish between adulterous

fornication and non-adulterous fornication. Even the death penalty in Edinburgh's act of 1560 for a third offence, was not specific to adultery although it anticipated to some extent the Act of 1563 anent 'notour' adultery. There appears to be a very clear difference in attitudes to different forms of adultery: 'notour' adultery was dealt with by Justices and liable to the death penalty; some other kinds of adultery, including bigamy, were dealt with by fining at the ayrs or local diets; and at the burgh level adultery was treated as fornication. Penalties at the ayrs and burgh courts were similar - fining, whipping, banishment, and imprisonment. The most important point is that under burgh laws these penalties applied equally to non-adulterous fornication.

#### 8.5. Religious penalties.

The attitude of the Church towards adultery is shown in its measures for the repentance of offenders. The system of the penitents' stool operated in parallel with punishments by the civil authorities. It was not unusual for a member of the kirk session to be also a civil magistrate. The material on adultery reveals how it was ranked in seriousness compared to other sins. The evidence examined refers to the form of repentance rather than the numerous individual cases which came before the kirk sessions, presbyteries, etc.

The first 'Book of Discipline' distinguished between sins whose punishment properly belonged to the Church and those which ought not to be punished by the Church as they belonged to the civil sword. The latter were capital crimes like blasphemy, adultery murder and perjury. The Church, however, was compelled to punish these crimes as well because the State did not punish them as it ought under God's law:



"We have spoken nothing of those that commit horrible crimes, as murderers, man-slayers, and adulterers; for such (as we have said) the Civil sword ought to punish to death. But in case they be permitted to live, then must the Church, as before is said, draw the sword which of God she hath received, holding them as accursed even in their very fact; the offender being first called, and order of the Church used against him, in the same manner as the persons that for obstinate impenitence are publicly excommunicated. So that the obstinate impenitent, after the sentence of excommunication, and the murderer or adulterer, stand in one case as concerning the judgment of [the Church], that is, neither of both may be received in the fellowship of the Church to prayers or sacraments (but to hearing of the word they may), till first they offer themselves to the Ministry, humbly requiring the Ministers and Elders to pray to God for them, and also to be intercessors to the Church, that they may be admitted to public repentance, and so to the fruition of the benefits of Christ Jesus, distributed to the members of his body".<sup>1</sup>

Adultery was thus ranked as one of the most serious sins and as the equal of murder or obstinate refusal to repent. Adultery was to be punished by the most severe penalties available to the Church. Theoretically excommunication was the equivalent of social ostracism because the excommunicant was cut off from both the Church and the community. Nobody, except his wife and family, was allowed to associate with him: it was forbidden to eat or drink, buy or sell, or even to greet or talk with him. The exclusion extended to his subsequent children as it was forbidden to baptise

1 'Bk. of Disc.'; 306, 308.

them until they came of age, or unless the mother or his special friends (kin?) presented the child and damned the impenitent for his obstinacy.<sup>1</sup> In 1572 an Act of Parliament was passed which reinforced this exclusion from society by confirming that the excommunicant was liable to civil penalties. He was to be put to the horn if he failed to reconcile himself with the church, ie he was to be declared a rebel and an outlaw, his goods confiscated, and he was to be put to death summarily on apprehension.<sup>2</sup>

The 'Book of Discipline' envisaged that the reception of excommunicant adulterers back into the Church would be made by the local congregations. This, however, was claimed by the General Assembly in 1568 as one of its responsibilities:

"nane that committit slaughter, adulterie, or incest, or heirafter sall committ the same, sall be recevit to repentance be any particular kirk, till that first they present themselbe befor the Generall Assemblie, ther to receive injunctiounes, and thereafter they sall keep the same ordour that was prescrivit to Paul Meth<sup>h</sup>ven in his repentance".<sup>3</sup>

Once again adultery is ranked with murder and on this occasion with incest, thus emphasising the Church's abhorrence of adultery. The case of Paul Methven was particularly notorious as he had been a leading Reformer in Dundee and later minister of Jedburgh, and his offence was compounded by his refusal to acknowledge his crime unless he was reinstated as a minister. His pleas were not helped by his flight to England where he was presented to a living.

1 'Bk. of Disc.'; 307-308.

2 'A.P.S.'; III, 76; see also IV, 16-17 (1593); VI, pt.I, 760 (1647); VII, 228 (1661).

3 'B.U.K.'; I, 125.

Eventually the Assembly decided on the method of his reception back into the Church:

"The said Paul, upon the said two preaching dayes betwixt the Sondagis, sall come to the kirk doore of Edinburgh, when the second bell rings, clad in sackcloath, baireheidit and bairefootit, and there remaine whill he be brocht into the sermoun, and placeit in the publick spectakill above the peiple in time of every sermon dureing the said two dayes, and in the nixt Sondag thereafter sall compeir in likemanner, and in the end of the sermoun sall declare signes of his inward repentance to the peiple, humblie requireing the kirks forgivenes; whilk done, he salbe cled in his awin apparrell, and receivit in the society of the kirk, as ane livelie member thereof; and this same ordour to be observit in Dundie and Jedbrucht".<sup>1</sup>

Not surprisingly, Methven remained in England. The Assembly's act of 1568 ratified this procedure of requiring the adulterer to receive his sentence in person from the Assembly. The actual form of excommunication was still being revised.<sup>2</sup>

The process was revised two years later on the occasion of some adulterers and incestuous persons appearing in linen cloth, bareheaded and barefoot, before the Assembly with testimonials of their repentance. It was ordained that in future such persons who had not been excommunicated would make the same appearance on three preaching days, but that those who had been excommunicated were to appear on six preaching days.<sup>3</sup> The effect of this was to treat

1 'B.U.K.'; I, 29, 31, 32, 55-56, 79-81.

2 'B.U.K.'; I, 37, 93, 131; see also, 74-75.

3 'B.U.K.'; I, 159.

the excommunicated adulterer (or incestuous person) as guilty of two offences, each requiring three appearances, instead of treating the offences as if they were one. The Assembly must have had second thoughts as the following day, 3 March 1570, it made another order for the reception back into the Church of homicides, incestuous persons, and adulterers, not fugitives from the laws. Persons excommunicated for these offences or other heinous crimes were to stand bareheaded at the church door on every preaching day between General Assemblies, and to sit in the public place during the time of the sermon. The number of appearances was considerably increased from the six agreed the previous day as the Assembly at this time met usually twice a year, for one or two months, and there were often three preaching days in a week. Those not excommunicated were not required to stand at the church door before and after the sermon. The number of appearances is not mentioned for these but presumably it was the same as for excommunicants.<sup>1</sup> The difference in punishment was in the method of humiliation rather than the number of appearances. Adultery is ranked as in previous references with murder and incest.

The General Assembly dealt with a number of queries in the next few years relating to this procedure. It was agreed that a single woman committing adultery should receive the same punishment as the married man. In 1573 relapsed adulterers were to be referred to the magistrate for punishment under the Act of Parliament of 1563, and in 1576 it was agreed that such offenders should be doubly punished.<sup>2</sup> The procedures were also adapted to the changes in the structure of the Church. Some time before 1588 it became the practice for repentant adulterers, murderers, and similar

1 'B.U.K.'; I, 160.

2 'B.U.K.'; I, 171, 267, 378.

offenders to appear before synods instead of the General Assembly. The Assembly decided in 1588 that the penitents should appear instead before presbyteries where they existed because

"the pentitents, at such times of the year quhen Synodall Assemblies are haldin, are in lawfull traffiqueing furth of the countrey".

The "accustomit ordour" of appearance before synods was to be kept where presbyteries were not well ordered or constituted.<sup>1</sup> This shows that presbyteries were regarded as an integral part of the Church's structure several years before James VI authorised the presbyterian system by statute in 1592.

Very few general enactments on the punishment of adulterers have been traced for the seventeenth century. This is partly, and perhaps mainly, because a thorough search was not made of synodal and presbytery records, and because the General Assembly did not meet for most of the century. The above act of 1588 was not, however, implemented by the Synod of Fife in the early 1600's. The Synod reserved to itself in 1612 the power of absolving murderers, incestuous persons, adulterers and quadrilapse fornicators.<sup>2</sup> In 1639 the same Synod ordained that adulterers should appear on the stool of repentance for half-a-year. This compared to three days for fornicators.<sup>3</sup> This is the same number of appearances as was included in an overture of 1648 for the remedy of the grievous and common sins of the Land. The details can be represented in the form of a table, ranking the crimes according to their seriousness.

1 'B.U.K.'; II, 710.

2 'Synod of Fife'; 47-48.

3 'Synod of Fife'; 120.

Table 5. Ranking of sexual crimes 1648.

<u>Offence</u>	<u>Number of appearances</u>
fornication	3 sabbaths
relapse in fornication	6 "
trilapse in fornication )	26 "
once fallen in adultery )	
quadrilapse in fornication )	39 " ( $\frac{3}{4}$ year)
relapse in adultery )	
incest )	52 " (1 year)
murder )	

Repentance was to be made before both the kirk session and presbytery except for fornication or relapses in fornication.<sup>1</sup> This ranking is different from that revealed by previous references, although the Assembly of 1648 can hardly be regarded as moderate. Adultery is seen as less serious than incest and murder and on a par with quadrilapse fornication. Only one adultery is seen as the equivalent of trilapse fornication. It is, however, much more serious than fornication or relapse in fornication.

When the General Assembly was re-established a considerable amount of effort was spent over many years in discussing, circulating and preparing a new 'Form of Process in the Judicatories of the Church of Scotland, with relation to Scandals and Censures'. Most of the material is not directly relevant to the present discussion as it deals with the nature of the evidence and procedures to be used in the Church's courts. It does show, however, that adultery was still regarded as a very serious crime. Adultery was one of the crimes which, though processes were initiated by kirk sessions, was brought to a conclusion by presbyteries as in 1588 -

1 'G.A.Acts'; 192-193.

"the session having the opportunity of frequent meetings of the Presbytery to have recourse unto, do not determine of themselves, such as scandals of incest, adultery, trilapse in fornication, murder, atheism, idolatry, witchcraft, charming, and heresy and error ... processes in order to the highest censures of the Church, and continued contumacy; ... the same is to be brought to the Presbytery, who may inflict what censure they see cause".<sup>1</sup>

There is some evidence to show what actually happened in practice. Graham concludes from his work on church records 1690-1730 that, as with fornication, the penalties for adultery were very varied. The number of appearances varied between 2 and 27. Presumably part of the variation he found was due to presbyteries being allowed to exercise their discretion, and thus match the penalty with the particular gravity of individual cases. A reworking of some of his material also shows that a much greater number of cases of adultery and trilapse fornication were dealt with by presbyteries than by kirk sessions (see Appendix 6).<sup>2</sup>

The attitude of the Church towards adultery revealed in the previous discussion of statute law was that it was a serious crime meriting death and that all forms of adultery should be equally punished. The Church was opposed to the distinction made between 'notour' and 'non-notour' adultery, although it was forced to accept that not all adulterers would be executed and that some would remarry. This also meant that the Church imposed penalties on adulterers and this became a permanent feature despite it being seen as a temporary expedient in the first 'Book of Discipline'. The evidence on these penalties confirms the serious view taken of adultery by the Church. It was ranked with crimes like murder, incest and

1 'G.A.Acts'; 411: see also 347.

2 Graham. 'Ecc. Disc.'; 159, app.c.

blasphemy. There does not seem to have been any softening of general attitudes as time went on: in fact, the number of appearances on the penitents stool was increased in 1570. At the same time responsibility for absolution was devolved from the General Assembly to synods and then later to presbyteries. This was probably a reflection of changes in the structure of the Church and the impracticality of all adulterers appearing before the Assembly. There also seems to have been a move away from the idea that all adulterers should suffer the same penalty as equally sinful – in the 1700's punishment was left to the discretion of the presbyteries. The Church ranked adultery in general as less serious than incest, and approximately equivalent to trilapse/quadrilapse fornication. Adultery was a specific crime with its own penalties and was not seen as just a variety of fornication which seems to have been the case with burgh laws.

#### 8.6. Summary.

It is not easy to write a coherent account of the official attitudes in Scotland, partly because of the conflicting material and partly because the substantive research – for instance, on the effectiveness and application of statute and burgh laws – has yet to be done. Some things are, however, clear. There is a dichotomy between the State's attitude and the Church's views. The Reformers saw adultery as a serious crime, in the same category as other capital crimes such as murder and incest, but much more serious than simple fornication. The Church wanted the State to enforce God's law – the death penalty for all adulterers. The General Assembly was opposed to the remarriage of divorced adulterers and only agreed to it at first as a temporary measure and later in recognition of the State's refusal to punish all adulterers by death. Even so, on at least one



occasion in 1633 a synod forbad the celebration of a marriage because the man

"committed adulterie twise with her, and children procreat by her in his wiffs time, quhen schoe was living, and hes committed fornication with her also since the death of his umquhile wiff".<sup>1</sup>

The Church emphasised that all forms of adultery were equally sinful and therefore should equally be punished by death. Adultery was so serious that initially all penitents had to appear in person before the General Assembly. Superficially the State also saw adultery as did the Church because the Act of 1563 made 'manifest and notour adultery' punishable by death. But this Act of Parliament only applied to the worst offenders as was made clear in 1581. The Church failed to persuade Parliament to accept their attitude, even in the very favourable political situation of the 1640's. The impression is that both Acts were deliberately worded so that most adulterers could evade its penalties.

There is also reason to believe that the statute law was not enforced. Even more striking is the lack of burgh laws anent adultery, and the possible lack of distinction drawn between adulterous fornication and non-adulterous fornication. The case of John Sanderson illustrates that the passing of laws against sexual crimes was a function of the political situation. Morality was not separated from political allegiance. This was similar to the modern position where support for divorce, a abortion, family planning, lowering of the age of consent, etc., is associated with radical political groups. Punishment of adultery was arbitrary, and included fining, whipping, banishment from burgh or country. Unlike the Church, the attitude of the civil authorities was that distinctions should be made in the punishment of adulterers. The most severe penalties were reserved for open cohabitation, procreation of adulterine children, and persistent unrepentant adulterers.

1 'Synod of Fife'; 114-115.

Parliament was more concerned about the social consequences of adultery than its sinfulness. The Acts of Parliament of 1592 and 1600 suggest that Parliament was disturbed by the effect of adultery on inheritance.

There is little evidence to show if adultery was a common crime. The preambles to the five Acts of Parliament between 1552 and 1600 usually do not use the frequency of the offence as justification for legislative action. The Act of 1563 refers to the vice as "perniciouslie and wickitlie usit within this Realme in times bigane be sindrie liegis". The Act of 1592 is exceptional when it says that failure to enforce the law anent 'notour' adultery had led to adultery increasing daily, and to a great number of divorces on the grounds of adultery.<sup>1</sup> This at least shows that Parliament did not feel on most occasions that adultery was a problem because it was so frequent. A better idea of what happened, rather than people's perceptions, can be obtained from Graham's work. Adultery was the most common kind of offence heard by the Presbyteries whose records he examined - 714 offences out of a total of 1,692. But this does not imply that the offence itself was common as is shown by a breakdown into individual Presbyteries (table 6). In most of these Presbyteries one or two cases involving adultery at the most were heard in a year. These figures are not corrected for the population at risk so that they are a poor guide to frequency or differences between areas. This is compounded by the fact that there is no way of relating the number of offences heard by Presbyteries to the number of people who avoided delation. It cannot even be assumed that these figures are a minimum as those accused were not necessarily guilty. Graham's research only shows

1 'A.P.S.'; III, 539; III, 543-544.

Table 6. Number of offences heard by Presbyteries.<sup>1</sup>

Presbytery	No.of cases A	No.of years B	No. of cases per year (A/B)
Aberdeen	26	16	1.6
Arbroath	13	27	0.5
Biggar	9	37	0.2
Brechin	18	21	0.9
Caithness	71	21	3.4
Chanonry	17	20	0.9
Cupar	17	19	0.9
Dunfermline	31	34	0.9
Dunkeld	46	17	2.7
Duns	19	29	0.7
Edinburgh	17	10	10.7
Forfar	6	14	0.4
Forres	15	20	0.8
Garioch	13	18	0.7
Haddington	25	27	0.9
Hamilton	39	30	1.3
Inverary	55	23	2.4
Jedburgh	29	30	1.0
Kirkcaldy	20	16	1.3
Middlebie	20	19	1.0
Paisley	41	27	1.5
Penpont	19	26	0.7
Perth	17	15	1.1
Stranraer	26	17	1.5
Wigtown	15	14	1.3
Total	714	547	1.3

<sup>1</sup>Graham. 'Ecc. Disc.'; app.C, 9-12. Graham gives the total numbers of years as 665. The total therefore overstates the frequency per year. The reason for the discrepancy is not known.

that adultery was sufficiently frequent to involve the Presbyteries in cases year after year, particularly as most involved the appearance of offenders on several occasions. This combined with the ranking of adultery as one of the most serious sins would be sufficient to account for the Church's view that adultery was too frequent. Even one case was too many when the ideal is that there should be no adultery.

The statutory penalty for adultery in Scotland was more severe than in Colonial America and England. In Plymouth Colony an act was passed in 1658 punishing adultery by whipping and the wearing of letters to identify the person as an adulterer. This law was copied by New Hampshire in 1679/80. Adultery was not punishable by death in Rhode Island, Pennsylvania, Delaware and Virginia. It was a capital offence only in Massachusetts under a law of 1631, though in 1694 a new statute was enacted similar to that of Plymouth.<sup>1</sup> In England bigamy was made a felony by an Act of 1604, except where the spouse of the first marriage had not been seen or heard from the other for seven years, or where the marriage had been dissolved by the ecclesiastical courts. During the Commonwealth this limited capital punishment was extended to adulteresses, but the man was only liable if the woman was married. This compares with 3 months imprisonment for fornication.<sup>2</sup> In 1800 British legislation was brought into line with the Scottish Act of 1600 by prohibiting the remarriage of the divorced party with the paramour named in the decree. The Act was entitled 'for the more effectual Prevention of the Crime of Adultery'.<sup>3</sup>

1 May. 'Social control'; 188-191.

2 Macfarlane. 'Marital and sexual relationships'; 118, 123.

3 May. 'Social control'; 171.

The application of the capital penalty in Massachusetts and England gives credence to the suggestion that in Scotland the Acts anent 'notour' adultery were rarely or only intermittently enforced in all their rigour. In Massachusetts there were only three executions for adultery, although cases occurred every year. Morgan concluded that in New England offenders for all sexual crimes were not treated as severely as permitted by law, but rather with patience and understanding. The Puritans concentrated their efforts on prevention more than on punishment.<sup>1</sup> The effectiveness of the English Act of 1604 is not clear from Macfarlane's thesis as he examined ecclesiastical and not criminal records. He does note, however, that bigamy was difficult to prove, cases were infrequent though commoner than incest, and only 2 cases from Boreham 1565-1599 were heard at the archdeaconry court. He suggests that the Act was partly a result of the contemporary discussion of polygamy, and partly a reflection of the great amount of movement about the countryside and a lack of countrywide communications which made it relatively easy to desert one's spouse in one area and remarry in another.<sup>2</sup> More interesting is the material on the English law of 1650. The records of the Western Circuit 1653 to 1660 show only three charges of the capital offence of adultery, the results of which are not known. In the North Riding of Yorkshire not a single conviction for adultery occurs among the comparatively numerous convictions for sexual offences. In seven cases of adultery the bills were ignored, in another no indictment was found, and a bond for

1 Morgan. 'Puritans and Sex'; 602, 603, 607.

May. 'Social control'; 188-190.

2 Macfarlane. 'Marital and sexual relations'; 119-120.

appearance was ordered in only one case though no further notice was taken. The sole known case in which a person was sentenced to hang for adultery was Ursula Powell in 1652 at a trial at the Old Bailey. But it is probable that she was not executed and she was certainly the last person to be convicted of adultery in the metropolitan district. Twenty-two women were subsequently tried in Middlesex, but all were found not guilty. May argues that the Act of 1650, which included fornication and incontinence as well as adultery, ceased to be effective because of the failure of juries to convict and the gradual dwindling of presentments. This was "the normal outcome of an increasingly unsympathetic public opinion".<sup>1</sup> It appears that in Colonial America, England and Scotland adultery was judged not to be a crime worthy of death, either by not having capital laws or by not enforcing capital punishment. The actual penalties may have been similar in these countries despite the existence in some places of statutes punishing adultery by death.

This brief summary of the law on adultery in England, Colonial America and Scotland raises several questions. Why was adultery regarded as more serious than intercourse between unmarried persons? Why were distinctions made between different kinds of adultery? And why did Scotland have harsher legislation than the other countries? The answer to the first two questions is the same.

The attitude of society to adultery was based on the social consequences of the crime and not on Biblical condemnations of its sinfulness. Calvin recognised that in his 'Commentaries on Genesis':

"husbands who have had illicit intercourse with unmarried women have not been subject to capital punishment; because that punishment was awarded to women, not only [on] account of their

1 May. 'Social control'; 153-154.

immodesty, but also of the disgrace which the woman brings upon her husband, and of the confusion caused by the clandestine admixture of seeds. For what else will remain safe in human society, if licence be given to bring in by stealth and offspring of a stranger? to steal a name which may be given to spurious offspring? and to transfer to them property taken away from lawful heirs?"<sup>1</sup>

The same attitude lay behind Hay's argument that the woman was not bound to petition for a separation on the grounds of her husband's adultery because

"there is less danger of scandal arising among the people from the man's action than from the woman's, and there is less danger of doubtful parentage of the offspring".<sup>2</sup>

This concept was shared by both Protestant and Catholic theologians, and also explains why MacKenzie regarded adultery as 'theft'.<sup>3</sup> The same idea was repeated a hundred years later by Dr. Johnson over dinner at Dunvegan Castle in 1773:

"Consider of what importance the chastity of women is. Upon that, all the property in the world depends. We hang a thief for stealing a sheep. But the unchastity of a woman transfers sheep and farm and all from the right owner."<sup>4</sup>

Adultery was more serious than fornication because it jeopardised the system of transferring property between generations by inheritance. The main social problem with fornication was the question of the maintenance of the child and his status. With adultery there was the danger that the property would not be inherited by the rightful heirs. There was no sure way for the husband to know that his wife's

1 Quoted in Boyd, 'Theological Presuppositions'; 9.

2 Hay. 'Lectures'; 65.

3 MacKenzie. 'Law and Customs'; 173.

4 Boswell. 'A Tour to the Hebrides'; 168.

child was his own. Adultery is thus seen as essentially an offence by a married woman rather than a single woman. The same difficulties did not arise with the adultery of a married man as his child could not be passed off as his legitimate heir. However, his offence was still worse than fornication as he could not maintain the illegitimate child without diverting some resources away from his own legitimate family.<sup>1</sup> Adultery was basically an issue of paternity, and its social consequences. In patrilineal societies it was men, as fathers, who gave ascribed status and the right to inherit to their offspring. The same problem does not arise in matrilineal societies where status is derived from the mother as the father is of less significance and the mother of a child is more easily known.<sup>2</sup> It can also be added that the modern, laxer attitude to adultery is a reflection of the decline in the social significance of ascribed status and inheritance.

This answer to the first question helps to explain the nature of the Acts passed by the Scottish Parliament against adultery. Their main concern was its effect on inheritance and not its sinfulness. This is shown in those forms of adultery which were defined as 'notour' by the Acts of 1581. The first is where "thair is bairnis ane or ma procreat", and this goes to the root of the whole problem of adultery. The second is where adulterers "keep companie and bed togidder notoriou-slie knawin". The offenders are cohabiting as husband and wife, with the definite risk that adulterine children will be procreated to the prejudice of the rightful heirs. The last degree is also preventative: persons who are suspected of adultery but, after admonition by the Kirk, refuse to abstain and satisfy the Kirk by repentance or purgation.<sup>3</sup>

1 Goode. 'The family'; 20.

2 Mair. 'Marriage'; 13, 16, 17.

Fox. 'Kinship and Marriage'; 115.

3 'A.P.S.'; III, 213.



All three degrees involve either adulterine children or situations where children are likely to be procreated. The connection of adultery with inheritance is made explicit in the Act of 1592 concerning the remarriage or cohabitation of women divorced for adultery:

"the ischew and successioun proceding of the saidis unlawchfull mariages breidis mony questionis in the law and tendis to the greit hurt prejudice and disheresing of the successioun begottin in formare lawchful marriage Quhilk of the law of god and man aucht to succed to thair inheritance Specialie be wemen heretrices ... Quha efter the unlawchfull mariage with the adulteraris haif defraudit and may defraude hurte prejudge and dishereis thair lawchfull successioun".<sup>1</sup>

The law already safeguarded the rights of the heirs where the woman did not hold property in her own right because as early as 1563 it had been established that a woman divorced for adultery was held to be patrimonially dead. This meant that her dowry remained with the husband, and she lost her right to terce. Similar disqualifications were incurred by the husband if he was divorced for adultery.<sup>2</sup> The Act of 1592 therefore brought the anomalous position of the woman who held property in her own right in line with the rest of the law.

The Act of 1592 also shows that adultery can be regarded as giving rise to the same problems as divorce, and remarriage after the death of the spouse. The research has been restricted to sex and its social control by marriage, and material on the law on remarriage or what happened in practice has not been examined. In other societies the disposition of property on remarriage was usually strictly controlled either by law (custom and statute) or by wills. This was usually done by granting only a life interest to the surviving spouse, eg. widow's bench, widower's courtesy.<sup>3</sup> These legal forms were long established

1 'A.P.S.'; III, 543-544.

2 Paton. 'Husband and Wife'; 110.

3 eg. Homans. 'Eng. Villagers'; 187-188, 193-194.

Drake. 'Population and Society'; 119, 136.

Arensberg and Kimball. 'Family and Community'; 212, 374, 381.

because remarriage was common. The measures required to safeguard the interest of the heirs of the first marriage were well-defined because remarriage was often a necessity, and therefore regarded as fairly normal. It was socially imperative to remarry because the household was an integral unit, whose efficiency in supporting the survivors was jeopardised by the death of the spouse, especially if there were young children.<sup>1</sup> In the remarriage of adulterers the same priority is given to safeguarding the rights of the heirs of the first marriage by not granting the divorced adulterer any property rights, even where she was an heiress. The law in Scotland regarded the adulterer as if he or she were dead as far as property rights were concerned. But there could be no safeguards against a married woman deceiving her husband so that he thought the adulterine child was his own. The law could only discourage the adultery of a married woman by punishing her severely.

The emphasis on inheritance implies that adultery with a married woman was regarded more seriously than adultery with a single woman. Marital status can be used to rank adultery:

1. married man \_\_\_\_\_ married woman
2. single man \_\_\_\_\_ married woman
3. married man \_\_\_\_\_ single woman

The records of individual cases examined were not sufficiently detailed or numerous enough to see if this hypothetical ranking is reflected in the application of penalties in Scotland. There are a few references, however, which suggest that the law was not applied equally to both sexes by specifically saying that the law should be applied to both sexes. The Act of 1563 states that 'notour' adulterers

1 eg. Berkner. 'The stem family'; 404.  
 Demos. 'Little Commonwealth'; 66-67, 194.  
 Knodel. 'Bavarian Village'; 364-365.

should be punished with "all rigour unto the deid alsweill the woman as the man doar".<sup>1</sup>

In 1650 the Commission of the General Assembly presented an overture to Parliament that the Act

"concerning the capitall punishment of adulterie may be explained and made clear to extend against the adulterie of a married man with ane unmarried woman, as well as against that of a married woman, with a married or unmarried man".<sup>2</sup>

It is also noticeable that most of the references to adultery concentrate on the adultery of the wife, though this may largely be due to the Act of 1592 anent adulteresses which is the Act of most interest to civil lawyers.<sup>3</sup>

Marital status and sex were probably not the only considerations. The social status of the offender is also important. In Samoa cases of adultery less conspicuous than the chief's wife were treated according to the relative rank of the offender and the offended.<sup>4</sup> The heirs were not likely to be defrauded if there was little or no hereditary property, and the punishment of adultery might reflect this. The social distance between the adulterers is another factor, as is the continuity of the relationship. A prostitute, even if married, is not likely to be punished as severely as a propertied married woman. The question of possible marriage or of deceiving a husband is unlikely to arise with a prostitute. MacKenzie however, argues that where the committer is married, it is still adultery whether the woman is a whore

1 'A.P.S.'; II, 539.

2 'G.A.Commissions'; II, 413: see also 'B.U.K.'; I, 171.

3 Cf.K.Davies. 'The sacred condition of equality'; 576.

4 Mead. 'Coming of Age'; 89.

or not.<sup>1</sup>

These five factors - sex, marital status, social status, social distance, and continuity of relationship - may affect the way the law is applied. All are the consequences of regarding adultery as the theft of property. It would not be surprising therefore to find that the penalties for cases of adultery varied widely. The courts could select from the different punishments - death, banishment, whipping, fining, imprisonment - a combination which matched the threat to society of the particular kind of adultery. Greater emphasis was likely to be placed on the sexual behaviour of the married woman because society was organised primarily on a patrilineal rather than a matrilineal principle. The mother of the child is usually known but not necessarily the father.

The final question posed was why did Scotland have harsher laws against adultery than other countries? There are two levels on which this can be answered. There was probably a great difference in the law as it was enacted and the law as it was enforced. Different laws in different countries may obscure the fact that there was a degree of conformity in the sentences of their courts. There does not have to be structural differences between Scottish society and Colonial America and England to explain why a Scottish Act of Parliament punished 'notour' adultery by death. Scottish courts may have punished adultery with penalties similar to those of courts in England, Virginia, Plymouth, and Massachusetts. The Scottish Acts were passed because of a particular political situation which might not have anything to do with structural changes in society. The English Act of 1650 similarly does not imply

1 MacKenzie. 'Laws and Customs'; 170.

that in 1650 the framework of English society was different from what it was in 1640 or 1660. The statute law was the result of a political process, and was therefore dependent on the interests of the groups competing for power. The Act of 1563 was intended to appease the Reformers. It was the Church of Scotland who wanted adultery punished by death. Their reasons were based on God's law and not on the social consequences of adultery. The success of their petitions and overtures depended on the political astuteness of the Church, and their ability to persuade influential people to accept their moral concepts. Parliament was more concerned with safeguarding the interests of the rightful heirs. Adultery was punishable by death in Scotland because of the theology of the Church of Scotland which was able to exert its influence through its political power.

---

## 9. SEXUAL RELATIONSHIPS BETWEEN THE UNMARRIED.

There were very few laws which punished specifically sexual intercourse between unmarried persons. Such relationships were usually comprehended under laws against fornication, lechery, whoredom, harlotry, profaneness, etc. Fornication was not solely an offence by single people. The definition of this word by William Hay in the 1530's is as true today as it was then:

"Fornication is understood in two senses. In the broad sense it means sexual sin in general, and so it is the genus to which adultery belongs. In the other sense, the strict sense, it is sin between an unmarried man and woman."<sup>1</sup>

In a similar way 'whoredom' and 'harlotry' did not refer only to sexual intercourse in return for payment. In 1566, the Kirk Session of St. Andrews explained to two offenders that

"be that word hurdom is signified and to be understand filthie lechery, committit with contenance, and persevering in the said filthy vice to the gret sclander of this congregacion".<sup>2</sup>

It is difficult to identify which laws punished sexual intercourse between unmarried persons. It is probable that the laws against whoredom were used to punish adultery as well. For instance, John Sanderson was sentenced for adultery under the act of 1560 anent idolators, whore-masters and harlots passed by the Burgh of Edinburgh. The following section thus deals with legislation which was not restricted in application to unmarried persons, and it may omit some general laws under which unmarried persons were punished. A similar lack of precision is paralleled in the modern work on illegitimacy rates - usually a distinction is not made between adulterine or incestuous children, or the offspring

1 Hay. 'Lectures'; 61.

2 'K.S.Reg.St.Ands.' (1); 263-264.

of unmarried persons or prostitutes. The legal definition of bastardy is used rather than an analysis of the social relationships within which the child was procreated.

## 9.1. Fornication.

### 9.1.1. Legislation by the State.

The first 'Book of Discipline' included a demand that fornication should be punished by the civil authorities:

"And because that fornication, whoredom, and adultery, are sins most common in this Realm, we require of your Honours, in the name of the Eternal God, that severe punishment, according as God hath commanded, be executed against such wicked offenders".<sup>1</sup>

It is not clear what punishment was intended. The Old Testament does not prohibit simple fornication as such. There are prohibitions against intercourse with foreign women and ritual prostitution, but these are primarily seen as acts of religious apostasy. Condemnation of fornication is only to be found in Pauline teaching, and appears to be based on a re-interpretation of the seventh commandment against adultery. A similar interpretation of this simple injunction is found in the Catechism of 1648 where it is expanded to cover a multitude of sins in behaviour, dress and thought.<sup>2</sup> The plea for civil penalties was not renewed until July 1562 when the General Assembly presented a supplication to the Queen and Privy Council requiring the

"punishment of horibill vices, sick as ar adultery, fornicatioun, oppin horedome, blasphemy, contempt of God, of his Word and Sacraments; quhilks in this Realme for lack of punishment, do even now sa abound, that sin is reputed to be no sin".<sup>3</sup>

1 'Bk.of Disc.'; 317.

2 Boyd. 'Theological Presuppositions'; 8.

May. 'Social control'; 23.

'Larger Catechism'; 222-225.

3 'B.U.K.'; I, 21. : see also 19.

Knox. 'Hist of Ref.'; II, 49.

No action appears to have been taken by the Privy Council in 1562, or by Parliament the following year although it did pass an Act against adultery. However, no answer to the supplication has been traced and it is possible that the Privy Council did pass an act.

The Privy Council did pass an act on 11 December 1564 against fornication together with a proclamation against adulterers and incestuous persons, and an act against brothel keepers. The punishment of fornication is so detailed that it was probably based on burgh precedents. The penalties were:

"for the first falt, alsweill the man as the woman, sall pay the soum offourty pundis; or than baith he and scho salbe impresonit for the space of aucht dayis, thair fuid to be breid and small drink, and thaireftir presentit in the marcate place of the toun or parrochin bair heid, and thair stand fastned, that thai may nocht remove for the space of twa houris, as fra ten houris to xij houris at none; for the secund falt, being convict, thair sall pay the soum of ane hundrith markis; or than the foirnamit dayis of thair impresonment salbe doublit, thair fuid to be breid and wattir allenerlie, and in the end to be presentit in the said marcat place, and baith the hedis of the man and woman to be schavin; and for the thrid falt, being convict thairof, sall paye ane hundrith pundis; or ellis thair abone impresonment to be breid and wattir allenerlie, and in the end to be tane to the depast and fowlest pule of wattir of the toun or parrochin thair to be thrise dowkit and thaireftir bannissit the said toun or parrochin for evir. And fra thinefurth, how oft that evir thair be convict of the foirsaid vice of fornicatioun, that so oft the said thrid penaltie be execut upoun thame, ... the saidis corporall panis Of impresoning, benissing, and utheris abone specifit be execut upon all sic personis as outhir refusis to pay the pecuniall panis, or that ar nocht responsall to pay the samin. And that the samin pecuniall panis, quhilkis sal happin to



be ressavit, be surelie kepit in ane clois box, and be convertit ad pios usus as it sall pleis the Quenis Majestie and Lordis of hir Secreit Counsall to command".<sup>1</sup>

The series of acts and proclamations by the Privy Council was probably intended as a political gesture to woo the Reformers towards the Queen. It is probably a continuation of Mary's policy of appeasement which had already been expressed in Acts passed in the Parliament of 1563, including one anent adulterers. The particular aim in December 1564 may have been to win support in preparation for Mary's marriage to Darnley on 29 July 1565.<sup>2</sup>

The reason for quoting the act of 1564 at length is that it was the forerunner of the Act of Parliament of 1567. The Reformers were not satisfied by an act of the Privy Council. The fifth item in the Articles of the General Assembly to the Queen on 26 June 1565 asked that such horrible crimes as abounds in the realm - idolatry, blasphemy, witchcraft, etc., and manifest whoredom and keeping of brothels - should be severely punished, and

"judges appointit in every province or diocie for the execution thereof, with power to doe the same, and that be Act of Parliament".<sup>3</sup>

The Reformers wanted the act of the Privy Council to be given the force of statute law to assist in its enforcement. Mary did not answer until December, after the Chaseabout Raid, when she replied that the article would be referred to Parliament for action.<sup>4</sup> However, when the Acts was passed in 1567 the political situation had changed: Mary had been deposed and Moray had been appointed Regent to the infant King James VI. The Act anent 'the filthy vice of fornication and

1 'R.P.C.'; I<sup>1</sup>, 297.

2 Donaldson. 'Scotland'; 112.

3 'B.U.K.'; I, 60.

4 'B.U.K.'; I, 68.

punishment of the same' was one of several which were the consequence of the State's recognition of the Reformed Church. Like the two Acts anent incest, it was a reward for the Reformer's support rather than an inducement. There was nothing novel in the Act: it followed almost word for word the act of the Privy Council of 1564, apart from variations in spelling and punctuation which are to be expected. One addition was the safeguard that the receivers of fines were to give an account of them whenever required to do so. As a sign of the changed times the responsibility for the spending of the fines was altered from the Queen and Privy Council to the King and his dearest Regent.<sup>1</sup>

No further legislative enactments were made against fornicators until the late 1640's. Before considering the later Acts of Parliament, it is apposite to consider what action was taken to enforce the laws. The Act of 1567 placed responsibility on the burgh councils, the Justice General and his deputies, and others granted royal commissions.

The records of the Burgh of Edinburgh show that action was already being taken in 1562 against fornicators. In May three members of the town Council were ordered to find a convenient place in the North Loch for ducking convicted fornicators, and the treasurer was ordered to prepare the place for use. In November the Council ordered adulterers and fornicators to be imprisoned for a month on bread and water before being brought to trial. Convicted fornicators were to be scourged at a cart's tail through the town, and to be banished from the Burgh until they gave assurances before the kirk session and magistrates to amend their way of life. In November 1563 the Council took the precaution that men should be imprisoned in a different place from women.<sup>2</sup> These actions were taken before the Privy Council passed its act in 1564 and it is probable that the Privy Council based its penalties on existing

1 'A.P.S.'; III, 25-26.

2 'Burgh Recs. Edin. '; III, 135, 152, 173-174: see also 154.

burgh law. Edinburgh already punished fornicators by ducking, a month's imprisonment on bread and water, and banishment, which were all penalties for trilapse in fornication under the Act of 1567. On several occasions the Burgh Council ordered the enforcement of the Act of Parliament against fornication - in 1571, 1581, 1582, 1583, 1587.<sup>1</sup> In 1589 the fines from fornicators, whores, and brothel-keepers were used for repairing Trinity College Church.<sup>2</sup> Other measures were also taken, apart from action against harlots (see below). In 1583 it was enacted that any burgess's daughter who was not a virgin at her marriage lost the right to make her husband a burgess or a brother of a guild.<sup>3</sup> No doubt other burghs, though not necessarily all of them, adopted similar measures. For instance, in 1593 the Kirk Session of St. Andrews engrossed in its register the Act of 1567 with the consent of the magistrates, specifying however that the fines were to go to the poor.<sup>4</sup> A case before the Council of Stirling in 1622 shows that they were also enforcing the Act of 1567, although in this particular instance of trilapse in fornication it was decided to banish the person without imprisonment and ducking. This was done with the advice of the Session.<sup>5</sup>

Commissions were granted by the Privy Council to individuals. The scope of the commissions were very wide, and the Act anent fornication was only one of many which the commissioner was empowered to execute. A possible incentive was a portion of the fines though there is no evidence to substantiate this. An example of an individual commission is the one granted by the King to William Ogill in 1607.<sup>6</sup> Two commissions in the 1620's granted the power to nominate justices in landward parishes (ie. non-burgh) for the enforcement of the Acts anent vice,

1 'Burgh Recs. Edin.'; III, 283; IV, 222, 259, 300, 490, 493.

2 'Burgh Recs. Edin.'; IV, 537-538.

3 'Burgh Recs. Edin.'; IV, 284.

4 'K.S.Reg. St. Ands' (1); 767.

5 'K.S.Reg. Stirling' (2); 463-464.

6 'R.P.C.'; VII<sup>1</sup>, 748-749.

including that against fornication. The commission of 1622 was for persons nominated by Bishops as justices.<sup>1</sup> The wording in two commissions granted in 1642 are very similar to those of 1622 and 1625, so that it appears this was a regular procedure which developed its own form.<sup>2</sup>

This material is sufficient to show that the Act of 1567 was enforced by some burgh councils and that some commissions were granted. The Act did not fall into desuetude. There were some weaknesses, however, and it was to these that Parliament turned its attention in the late 1640's.

The General Assembly in the 1640's had to cajole and urge an unenthusiastic Parliament to take action against fornication in the same way as it did with the more serious crimes of adultery and incest. As usual, Parliament's first reaction was to ratify the existing law and to appoint a committee. In 1647 Parliament replied to the Remonstrance of the Kirk that

"they doe heirby Ordane all actis alreadie passed for punishing of vice and advanceing of vertue to stand in force and be put to due execution Recommending the same to all ministers of justice quhom it concernes And that they ar yet readie to enact anie further new Lawis and ordinances necessarie for that purpose haveing appointed a Committie for actis and overtors to meit with Mr James robertourne the justice deput at all conveient occassions for receaveing and considering the desires and overtors of the saidis Commissionars and to prepare a report of their opinione therein to the parliament with all diligence".<sup>3</sup>

1 'R.P.C.'; XII<sup>1</sup>, 646-647; I<sup>2</sup>, 93.

2 'R.P.C.'; VII<sup>2</sup>, 315, 357.

3 'A.P.S.'; VI, pt.I, 692.

The Act of 1567 would have been one of those ratified. It was this committee which considered the Assembly's overtures anent incest and adultery, and it probably considered a similar overture anent fornication. The Act against fornication of 1 February 1649 was passed as a result of the urgings of the Assembly, although the particular overture has not been traced. On 10 August 1648 the General Assembly allowed several overtures. The one on civil remedies for the sins of the land states that

"for the present, untill the overtures are prepared to be presented to the Parliament, it is recommended to every congregation to make use of ... all other Acts~~/~~of Parliament for restraining or punishing of vice; particularly, for the better restraining of the sin of whoredom, that each magistrate in every congregation exact and make compt to the Session of fourty pounds for each fornicatour and fornicatrix, of an hundreth merks for each one of their relapse in fornication, of an hundreth pounds for each adulterer and adulteress, according to express Acts of Parliament, which is to be exacted of those who may pay it, and the discretion of the magistrate is to modifie it according to the ability or inability of each delinquent".<sup>1</sup>

This reinterpretation of the Act of 1567 uses the same penalties for the first offence and relapse, but replaces trilapse in fornication by adultery. It also ignores the non-monetary penalties of standing at the market cross, shaving of heads, ducking and banishment. Neither is reference made to the alternative corporal penalties. Perhaps these parts of the Act of 1567 were no longer enforced. That an overture was actually made is confirmed by the fact that the Clerk to the Commission of the General Assembly did refer to the Act of 1649 against fornication in his report on the overtures made to Parliament.<sup>2</sup>

1 'G.A.Acts'; 192, 194.

2 'G.A.Commissions'; II, 240-241.

The preamble to the Act against Fornication of 1649 is used to justify the change in law, and there is no reason to suppose that the explanation is not true unlike some other Acts. It is said that the Act of 1567

"Is become desuetude in many places of this kingdome and rendered ineffectuall becaus one and the same penalty is enjoined upon persons of all ranks and qualitie By which It comes to passe that the fore-said sin does exceedinglie abound unto the Dishonour of God and scandall of the gospell".

The public humiliation of offenders may have been more effectual against the higher ranks of society than a standard fine which was more of a burden to the poor. The complaint is that the penalties were not severe enough to penalise **and** discourage fornication by the nobility and gentry. Parliament ordained that a person convicted of fornication

"shall pay for the first fault ilk nobleman four hundreth pounds ilk barone and Landed gentleman Two hundreth pounds ilk other gentle man and burges ane hundreth pounds ilk fermour Twentie pounds (Twentie five?) (every other person of inferior quality Ten pounds) and that these penalties shall be Doubled toties quoties according to the relapses and the degries of the offences and qualities of the offenders And that the saids penalties shall be exacted not onlie aff the man bot also of the woman according to her qualitie and the degree of her offence the one without prejudice of the other".

The use of a graduated scale of fines was not novel - it had been used in the Act of 1641 anent persons who married outside Scotland and was repeated in the Act anent clandestine marriages of 1649 which was passed twelve days later (see 5.1.2, table 3 ). The number of degrees and the graduation of the fines was different in all three Acts. The fines for fornication were considerably less eg. a nobleman

was fined L400 for fornication, but L1,000 in 1641 and L5,000 in 1649 for a clandestine marriage. It is surprising that the minimum penalty is a quarter of the fine of L40 for the first fault under the Act of 1567, especially as the Parliament of 1649 was not noted for its moderation. Perhaps the fine was reduced to a level that an 'inferior person' could be expected to pay. If he could not pay he may have escaped punishment altogether unless corporal penalties were inflicted. The effectiveness of the Act of 1567 may have been reduced if the fine was so high that only a minority could afford to pay. The clause allowing different fines to be levied on the man and the woman shows that Parliament recognised that fornication was not always between social equals, for instance, between nobleman and a domestic servant or prostitute. The fines were to be delivered to the kirk session for pious uses. The two remaining clauses ratified the Act of 1567 in all other respects and declared that these civil punishments were without prejudice to the censures of the Church. It is not clear exactly which parts of the Act of 1567 were ratified unchanged. It was probably the clauses which enjoined corporal pains for those unwilling or unable to pay, and which placed responsibility for enforcement on burgh councils, the Justice General, and persons granted special commissions.<sup>1</sup>

There was another Act passed in the same month which also may have included fornication. The Act was for the better enforcement of penalties against non-capital scandalous offences, especially swearing, drinking, and mocking of piety. Fornication is not mentioned although the enforcement of the laws of 1567 and 1649 was probably hampered by the same difficulties that this Act was intended to remedy. The complaint was that the Act of 1645 was ineffectual because

1 'A.P.S.'; VI, pt II, 152-153.

"the persons nominat for that purpose either will not accept of that Employment or are negligent therein or will not exact these penalties nor inflict these paines without a new Civill processe".

Severe penalties were laid down for refusing to enforce the laws and it was also statuted that no further process was necessary if the offender had been convicted by a kirk session. A tenth of all penalties was set aside for the payment of officers to collect fines on behalf of the magistrates. This implies that fornication was excludet as the Act anent fornication reserved all fines for pious uses by the kirk session. The Act is, however, evidence that law enforcement was a general problem, and that there may have been some doubt as to the admissability of convictions by kirk sessions as evidence in civil trials.<sup>1</sup>

The evidence is ambiguous for the enforcement of the law during the English occupation. In 1653 the English Commissioners in the Court of Justiciary sentenced offenders to either pay £40 or on refusal to be imprisoned for eight days on bread and small drink, and to stand in the pillory for an hour bareheaded on the next market day. This conformed to the punishment for a first fault under the Act of 1567, except for the reduction in their public appearance from two hours to one hour.<sup>2</sup> However, the instructions to the Justices of the Peace in December 1655 quoted the Act of 1649. The penalties for a farmer was given as £25 and £10 for 'inferior persons'.<sup>3</sup>

The Act of 1649 was rescinded at the Restoration along with all other Acts between 1640 and 1649. Some of the legislation of the 1640's

1 'A.P.S.'; VI, pt.II, 184; VI, pt.I, 458.

2 Arnot. 'Celebrated Crim.Trials'; 321.

3 Firth. 'Scot. and Protectorate'; 404-405.



was re-enacted in 1661; for example, Acts against irregular marriages, and beaters and cursers of parents. There are references in the correspondence between James Sharp and Patrick Drummond in the spring of 1661 to attempts to have laws passed against profanity. In a letter of 31 January, for instance, Sharp wrote that

"I am endeavouring that there be an act passed also against profanity, & for owning of the doctrin & disciplin of this church, for which some promises are given to us".<sup>1</sup>

If this lobbying included action against fornication, the results were unsuccessful. The Acts which were passed on 7 June dealt only with Sabbath observance, swearing and excessive drinking.<sup>2</sup> The only statute law under which fornication was punishable remained the original Act of 1567. Parliament did, however, include fornication in its Commission and Instructions to Justices of the Peace. One of their responsibilities was

"to put in execution the acts of Parliament made for punishing of all persons that shall be fund guiltie of the sin of fornication".<sup>3</sup>

Similar commissions were granted in 1662 and 1663. In one case the Privy Council granted a supplication for the use of the fines to repair a bridge.<sup>4</sup> It would appear that at the Restoration the position reverted to what it was in the 1620's with the Justices of the Peace responsible for fining fornicators.

It was not until 1672 that changes were made to the Act of 1567. There is no direct evidence to show why it was decided in that particular year to revise the method of enforcement. The same Parliament passed laws against unlawful ordinations, including penalties for celebrating irregular marriages, and for the baptism of children within 30 days of birth.<sup>5</sup> These Acts may represent an

1 'Lauderdale Papers'; I, 71: see also, 73, 88.

2 'A.P.S.'; VII, 262.

3 'A.P.S.'; VII, 310.

4 'R.P.C.'; I<sup>3</sup>, 146, 471-472.

5 'A.P.S.'; VIII, 71, 72-73.

assertion by Parliament of support for the established Church despite the issuing of an indulgence to non-conforming ministers. The Act of 1672 against profaneness sets the pattern for the Acts of 1690, 1693, 1695, 1696, and 1701. These statutes bring together under one heading previous Acts against cursing, swearing, drunkenness, Sabbath observance, etc. No longer are there individual amendments to the separate laws against each kind of offence. The original penalties are left unaltered and the enabling parts of the Acts deal with improving the enforcement of the law.

The Act of 1567 is not specifically mentioned in this Act of 1672. Fornication was, however, referred to in the preamble and is included in the Act by the citing of the instructions to the Justices of the Peace issued by Parliament in 1661 (see above). The purpose of the Act was to remedy the many and great violations of the law of God, and of the laws of this kingdom. Parliament ordained that Justices of the Peace, Burgh Magistrates, etc., should execute the existing laws against profaneness on offenders delated to them by kirk sessions and other Church courts, without prejudice to the Church's own disciplinary penalties. Arrangements were also made for the appointment of people to collect the fines. Part of the fines was to go to the collectors, and the remainder was to be divided equally between poor relief for the old and infirm, and the poor in the correction house who were to be trained in a trade. Responsibility for enforcement of the laws and disposal of the fines was placed firmly on the kirk session and heretors of each parish. The main provisions of the bill deal with the collection and apportionment of funds for the support of the poor. The enforcement of the existing law is subordinated to the financial aspects. The Act reads as if the civil penalties were only exacted on offenders referred to the magistrate by the Church courts. The initiative for prosecution lay with the kirk

session - the magistrate could not deal with offences which had not been heard by the session. This in effect extended the procedures established by an Act of 1617 against drunkenness to fornication and other similar offences.<sup>1</sup>

A case heard by the Privy Council in 1681 confirms that the power of the Justices of the Peace to punish offenders depended on kirk sessions. Civil penalties were an additional and optional punishment to the fines exacted by the kirk session who were primarily responsible for the enforcement of the Acts of Parliament against immoral persons. The Lord Advocate, Sir George MacKenzie, stated that the Act of 1672

"declared that the justices of the peace are only to execute the sentences of kirk sessions in these caices and are only to proceed against such delinquents as are dilated by the kirk sessions" and the justices of peace have no power to judge therein except upon delation by the kirk session, "which are not in use to require but in some singular cases where is necessity of their concurse".

The Privy Council accepted his interpretation and added that kirk sessions had the same power to impose fines as justices of the peace - "the kirk sessions haveing as to this point accumulative jurisdiction with the justices of peace".<sup>2</sup> The punishment of fornication, including civil penalties, was recognised as primarily the responsibility of the kirk sessions, although this may have been because the civil authorities were not interested in enforcing the penalties. Presumably the intercession of the Justices was only requested where the offender was to be punished corporally because of his inability or unwillingness to pay the fine, or his offence was compounded by other offences of greater interest to the civil authorities (eg. harlot,

1 'A.P.S.'; VIII, 99-100.

'A.P.S.'; IV, 548.

2 'R.P.C.'; VII<sup>3</sup>, 115-116.

keeping a brothel). The Act of 1672 explains why MacKenzie was able to write as his observation on the Act of 1567 that

"Fornication is now punish'd only by the Kirk Session, and this Act is not exactly observed, for the offenders now only pay an Arbitrary Fine, and stand upon the Stool of Repentance".<sup>1</sup>

It would appear that the payment of a fine was the only part of the Act of 1567 which was still enforced.

The establishment of Presbyterianism after the 'Revolution' of 1688 made no significant change in the law relating to fornication. The five Acts of Parliament passed against profanity between 1690 and 1701 were largely concerned with the enforcement of the law as established in 1672. These lengthy Acts reveal little about attitudes to fornication and will only be considered briefly. The main point is that fornication was not seen as a crime which demanded more attention than other immoralities, like swearing and drunkenness. The Acts are on the whole a ratification and codification of existing legislation, and are a legislative counterpart to Stair's 'Institutes'. The justification for the Acts, however, remains traditional - immorality is rife because the law is not enforced.

Immorality in general was probably a sensitive issue as one of the first measures taken was the ratification and revival by Parliament in 1690 of all previous laws against profaneness, especially the Act of 1672.<sup>2</sup> This cannot have been very effective as a year later the Privy Council appointed a committee whose terms of reference included:

"to consider the late Acts of Parliament made against prophaness and anent beggars and what course will be fitt to follow for putting

1 MacKenzie. 'Observations'; 177.

2 'A.P.S.'; IX, 198.

follow for putting them effectually to executione and to report".<sup>1</sup>

It is possible that the legislative results of this committee was the Act against Profaneness of 1693. The only innovation made was the empowering of presbyteries to appoint persons responsible for the delation and prosecution of offenders before the magistrate. This was really only an extension of the powers of kirk sessions to presbyteries, and thus a recognition of the new status of presbyteries.<sup>2</sup>

In the Act of 1695 it was again complained that the Act of 1672 was ineffective. This was said to be because of the negligence of the civil magistrates in not enforcing the Act, and they were ordered to put the law "to exact and punctual execution, at all times ... and against all persons". The Act specified the procedure for citing erring magistrates before the Lords of Session and made them liable to a fine of £100.<sup>3</sup> Further measures were included in the Act of 1696 for "the better and more expedit and effectuall execution" of the laws. In future the civil magistrate was to put the laws in full execution "at the instance of any person whatsoever", and not just as previously at the request of presbyteries and kirk sessions. Heretors and kirk sessions were to nominate deputy justices in parishes where the justice, within whose jurisdiction it was, did not reside. The justice was to be fined £100 if he refused to accept the nominee as his deputy. Offenders were to be imprisoned until they found surety for payment of the fine, and were to be corporally punished if unable to pay. The Act tried to make sure that there was someone in every parish with authority to exact the civil penalties, and to ensure that offenders were prosecuted even if the Church did not refer them to the magistrates for punishment. Probably the most important clause, however, was that

1 'R.P.C.'; XVI<sup>3</sup>, 297.

2 'A.P.S.'; IV, 327-328.

3 'A.P.S.'; IX, 387-388.

"no pretence of different persuasion in matters of Religion shall exeem the delinquent from being censured and punished for such Immoralities".<sup>1</sup>

The last Act in this series was passed by Parliament in 1701. It renewed and ratified all previous laws against profaneness and recites the main provisions of the Acts of 1672, 1693, 1695 and 1696. Unlike these previous Acts, however, particular mention is made of the Acts of 1563 and 1581 anent adultery. This is exceptional as none of the Acts since 1672 had specifically cited any of the earlier laws against adultery, and only referred to them in general. The reason why adultery was given this special privilege is not known. The only other innovation was that the Privy Council, on application by the General Assembly, synod or presbytery, would present the name of excommunicants to the King so that he may be duly informed that the person is "not fit to be employed or continued in any place of public trust civil or military".<sup>2</sup>

Excommunication, however, was probably very difficult to enforce and only of slight practical use. Its importance was rhetorical and symbolic, representing the support given by the state to the discipline of the Church, and that membership of society and the Church was identical. The Act endorsed, ten years before the Act of Toleration, the idea of one Church and one state.

The Act of 1701 was probably passed as a result of pressure from the General Assembly. On the 8 November 1700 the Commission to the Assembly complained to Parliament that the law against profaneness

"in many places hes never taken effect because many parishes have been negligent in nominateing such Magistrats ... and partly

1 'A.P.S.'; X, 65-66; 14, 47, 57.

2 'A.P.S.'; 279-280.

out of fear least such as should be nominat would not accept of deputationes and partly because ther may be a Magistrat resideing that hes jurisdictione over a pairt of the paroch and not the whole ...".<sup>1</sup>

Four days later the draft of an Act against Profaneness was brought in from the Committee for Security and read for the first time. It was read again on the 5 December, and remitted to the Committee for Security for amendment. The revised Act was read for the first time on 2 January, and approved after a second reading on 3 January when an amendment was rejected. The Act finally became law on 31 January 1701.<sup>2</sup> This detail shows that Parliament by this time exercised the right to amend officially sponsored bills, and it is unfortunate that the nature of the changes is not known. Possibly the clauses relating to adultery are an insertion. The Assembly's influence is difficult to determine as no new remedies for their particular complaints are included in the Act. The Assembly did, however, thank the King for giving royal assent to this Act and others.<sup>3</sup>

It is probable that the other Acts of 1693, 1695 and 1696 had a similar genesis. For instance, in 1695, the Presbytery of Dundee held a special meeting in response to a letter from the Moderator

"to the end that they might commune together about the affairs of the Church both before, and in time of the sitting of Parliament".<sup>4</sup>

In petitioning Parliament in 1700, the Commission was in fact carrying out the instructions given to it by the General Assembly in the previous February. These included

"I. That this Commission, as often as they shall see cause, apply to the Government, or any magistrate, for their countenancing of the concurring with the judicatories of the Church in what

1 'A.P.S.'; X, app.47.

2 'A.P.S.'; X, 214, 223, 235, 240, 272.

3 'G.A.Acts'; 302.

4 Green. 'Comm. of the G.A.'; 94.

the law allows, and for putting the laws in execution against profaneness" and the maintenance and work for the poor.

"X. This Commission is to give all due encouragement and assistance to any proposals that may be made to them anent endeavours for reformation of manners, and for the effectual curbing of profanity; and that they apply in a competent manner to the Government for that end".<sup>1</sup>

These instructions became standard, with only a few minor changes, for at least the next fifteen years. They show that the Assembly continued to press for the co-operation of the state in the enforcement of moral legislation, and if necessary, further legislation.<sup>2</sup> No new laws were passed, however, between 1701 and the Act of Union in 1707. The Commission's earlier successes in canvassing Parliament were not repeated. Green describes the Commission in the period 1695-1700 as "the instrument of the Church to stir the zeal of the judicatories of the Church and to awaken the civil magistrates to their duty".<sup>3</sup>

The Act of 1567 against fornication was the fundamental piece of legislation for the civil punishment of fornication. This Act was a ratification of the 1564 act of the Privy Council, which in turn was probably based on earlier burgh laws. The subsequent Acts of 1649, 1672, 1693, 1695 and 1696 were mainly concerned with the enforcement of the law. For instance, in 1649 the measures included a sliding scale of fines according to rank and the simplification of procedures by not requiring any further process if a person had been convicted by a kirk session. In 1696 the kirk sessions and heritors

1 'G.A.Acts'; 298.

2 See: 'G.A.Acts'; 309-310 (1701), 319 (1703), 333-334 (1704), 389-390 (1705), 417 (1707), 425-426 (1708), 436-437 (1709), 447-448 (1710), 451-452 (1711), 466-467 (1712), 483 (1713), 516-517 (1717).

3 Green. 'Comm. of the G.A.'; 94.



were empowered to nominate someone to exercise the jurisdiction of a magistrate in areas where none resided. Only studies at the local level will show how the Act of 1567 was actually enforced, and if MacKenzie was right in his statement that fornication was only punished by kirk sessions by arbitrary fines. It is clear, however, that William Forbes is wrong when he quotes the fines of 1649 as the civil penalty for fornication in 1707.<sup>1</sup> The most striking characteristic of the Acts after 1690 is the inclusion of fornication as only one of many kinds of offences under the heading of profaneness. This is also shared by some of the burgh legislation where fornication is not specifically mentioned.<sup>2</sup>

The influence of the Church can be seen in all the Acts, and it is possible that without its pressure Parliament would have passed no laws against fornication. The repeated complaints of lack of enforcement seem to show an attitude of complacency on the part of the civil authorities. There was a willingness to leave the punishment of fornication to kirk sessions. For instance, in 1672 Justices of the Peace were restricted to punishing only those found guilty or delated by kirk sessions. The willingness of Parliament to pass laws against profaneness after 1690 is probably explained by the political situation rather than a change in heart. Both the Government and the Church were newly established, and both needed the support of the other. An Act against profaneness was a painless way of demonstrating support for the new Church of Scotland, in the expectation that the Church would reciprocate. The lack of any Acts between 1701 and 1707 may show that the Government was sufficiently confident of its own security as to be less receptive to the demands of the

1 Forbes. 'Duty and powers'; 14.

2 eg. 'Burgh Recs. Peebles'; 131-132 (1689), 142-144 (1693), 165-166 (1701), 170 (1703).  
'Burgh Recs. Stirling'; II, 93 (1700), 94-95 (1701), 96 (1702), 117 (1708).

General Assembly. Or it may be because Parliament was too busy considering the Hanoverian succession and the proposals for Parliamentary Union. The Church was still powerful enough in 1711, however, to demand some favours in return for acquiescing to the Act of Toleration. One of these concerned profaneness and in the eighth clause of the Act it was declared that

"it is the true Intent and Meaning of this Act That all the Laws made against Prophaness and Immorality and for the frequenting of Divine Services on the Lords Day commonly called Sunday shall be still in force and executed against all Persons that offend against the said Laws or shall not resort either to some Church or to some Congregation or Assembly of religious Worship allowed and permitted by this Act".<sup>1</sup>

#### 9.1.2. The punishment of fornication by the Church.

The punishment of immorality by fines and penance was not an innovation made at the Reformation. Such penalties had been inflicted by the Scottish Church who had also sought the assistance of the civil authorities. For instance at the General Provincial Council of 1559 it was statuted that

"laymen's offences, appertaining to ecclesiastical jurisdiction shall be punished and atoned for, according to the kind and degree of the offence ... and the aid of the secular arm shall be invoked against disobeyers".

It was also ordered that the pecuniary fines should be used for pious purposes.<sup>2</sup> Fornication was condemned specifically by the Provincial Council of 1549 and all laymen, as well as priests, were admonished to abstain from concubinage. Marriage was recommended to the single who could not remain celibate.<sup>3</sup> Part of the reason why specific

1 'Stats.of Realm'; 559.

2 'Statutes'; 170, no.273.

3 'Statutes'; 91, no.173.

measures against fornication are notably absent from the records of the General Assembly may be that the penalties were based on those of the Scottish Church.

In the first 'Book of Discipline' jurisdiction over fornication was claimed as properly belonging to the Church along with offences like excessive eating and drinking, licentious living, and wanton words. Only one appearance before the congregation appears to have been envisaged.<sup>1</sup> The details of how this proposal was implemented are not given in the Assembly's surviving records. There are the references already cited which show that the Assembly pressed for civil punishments in 1562, and that the Act of 1567 was passed as a piece of political bargaining with the Church. The measures which the Church took for the punishment of fornication in its own courts are, however, less obvious. In 1564 it was decided that trilapse offenders, for instance fornicators and drunks, should be referred to superintendents for severe punishment. The number of appearances, which had to be more than one, was left to the discretion of the superintendent. This implies that a single appearance was required for a first fault.<sup>2</sup> Thirteen years later, in 1576, the Assembly did pass an act anent the form of repentance for fornicators. It was decided that:

"ane of the dayes of thair appeirance to make repentance for thair offence, be on ane Sondag at ten houres befor noone, in time of preaching, in presence of the congregation; and that double fornicators receive double punishment for thair offence".<sup>3</sup>

The phrasing suggests that the punishment of single fornication had been increased to more than one appearance. It is noticeable

1 'Bk. of Disc.'; 306-307.

2 'B.U.K.'; I, 56.

3 'B.U.K.'; I, 379.

that the Assembly did not enact a specific punishment but apparently left it to the discretion of the kirk sessions. The Kirk Session of St.Andrews, for instance, ordained in an act of 1593 that fornicators were to appear on the penitents' stool three times - Sunday, Wednesday and Friday - at the time of sermon for each fault. Four years later trilapse fornicators were to make repentance on all the preaching days for three weeks (9 appearances?), two weeks in their own clothes and the third in the habit of adulterers.<sup>1</sup>

The first reference to fines does not occur until 1573, six years after the Privy Council passed an act for the civil punishment, including fining, of fornication. The Assembly was asked if it was lawful to impose fines for drunkenness, fornication, profanation of the Sabbath, etc. The answer was that the Acts of Parliament should be enforced against fornicators and Sabbath breakers.<sup>2</sup> Presumably some kirk sessions were imposing fines on offenders, while others were not, and there was some doubt as to whether temporal pains were the responsibility of the Church or the magistrate. The Act of 1567 did not empower the Church to enforce the punishments so it does look as if the Assembly was saying that fining by kirk sessions was unlawful. This, however, assumes that the Assembly interpreted the Act as it was written, which need not have been the case. The Assembly may have believed that the fines of 1567 could be exacted either by the magistrate or the kirk session.

The registers of the individual kirk sessions should show if the Church exacted the penalties of the Act of 1567. For instance, the editor of the St.Andrews' Kirk Session Register for this period concluded that "from the very first<sup>the</sup> session recognised that civil punishments belonged to the civil magistrates. Offenders are

1 'K.S.Reg.St.Ands.' (1); 767, 837.

2 'B.U.K.'; I, 284.

frequently committed, or remitted to the bailies for civil correction". Imprisonment was the most frequently afflicted penalty other than penance, and was not regarded as part of ecclesiastical penance.<sup>1</sup> John Lawson and Bege Powerd, to cite just one example, were convicted of fornication in 1565 and were committed to the magistrates to be "punist civile according to the law". Similarly in 1573 the Session ordained that adulterers and fornicators should be remitted to the magistrates for punishment. It is also significant that the Session supplicated the magistrates to consent to an act punishing fornication by living-in servants with fines rather than passing the act on their own authority. It was proposed that the servant's master should pay the servant's half fee direct to the collector of the alms for the poor.<sup>2</sup>

However, there are some references which suggest that the Kirk Session of St.Andrews did exercise 'civil' jurisdiction. In 1576 the Session ordered that all offenders, such as fornicators and adulterers, should be imprisoned in the steeple of the parish church. Furthermore the gaoler was the beadle and not a town-officer.<sup>3</sup> However, this is open to different interpretations as the Session may have agreed to the use of the church as a prison at the request of the burgh council, especially as the Session usually included two or three bailies. It will be recalled that in Edinburgh it was the Council which took steps to provide the prison within the church for fornicators and adulterers.<sup>4</sup> Rather than a blurring of responsibilities, this may be only another example of the close co-operation of the civil and ecclesiastical authorities.

1 'K.S.Reg.St.Ands.' (1); liv-lv.

2 'K.S.Reg.St.Ands.' (1); 254, 373, 377-378.

3 'K.S.Reg.St.Ands.' (1); lvi, 417.

4 'Burgh Recs.Edin.'; III, 154, 173-174.

More interesting are the specific references to the Act of 1567 anent fornication in the St.Andrews' Register. This first occurs in 1583. On the 25 December three cases of fornication were dealt with in a similar manner. In one of these, for instance, David Muffett and Emmy Paty confessed that they had intercourse together, and that Emmy was pregnant by David. The Session decided that

"Thai ar baith decernit to mak humiliatioun, and David to pay XXs. to the puir in part of pament of the Act, and Emmy to enter in presson".<sup>1</sup>

In 1593 the Session, with the consent of the magistrates, ordered the Act of 1567 to be read out in church on the following Sunday. Two years later it was ordered that all adulterers, incestuous persons and fornicators should be punished according to the Acts of Parliament.<sup>2</sup> The Acts of 1593 and 1595 may only be a declaration by the Session that they would delate fornicators to the magistrates for civil punishment under the Act of Parliament of 1567. The decision of 1583, however, does show that the Session on its own authority punished fornicators by civil penalties - fining and imprisonment. Presumably Emmy Paty was imprisoned because she was unable to pay the fine, or even a part of the £40 prescribed by the Act as in the case of David Muffat. But of equal importance is the Session's request of 1599 that

"the magistratis to put the Act of Parliament maid againis fornicatouris to executioun; and that ilk fornicatour suld pay at leist iiij lib in part of pament thair of, utherwayis nocht to be relevit of imprissonment, and sa proportionalie to multiplie be samin according to thair factis".<sup>3</sup>

1 'K.S.Reg.St.Ands.' (1); 515.

2 'K.S.Reg.St.Ands.' (1); 767, 809.

3 'K.S.Reg.St.Ands.' (1); 887.

There is the same relaxation of the severe fines of 1567, but this time it is clear that the Session regarded civil penalties as the responsibility of the magistrate. It is quite possible that the same Session on occasions did levy civil penalties, while at other times it did not and, in view of the question before the General Assembly in 1573, some kirk sessions imposed fines and imprisonment while others did not. For instance, in the same year that the St. Andrews' Session publicly read out in church the Act of 1567, the Kirk Session of Elgin decided that

"all personis convict of fornicatioun sall mak thair repentance thairfor bairfutit and bairleggit fra this time fordward, and lyckeayis being relapsit throsis, nocht responsall in geir sall remove and be baneist".<sup>1</sup>

Banishment, after imprisonment and ducking, was the penalty prescribed by the Act of 1567 for trilapse fornicators unable to pay the fine of £100.

There are no further references until the 1640's to the punishment of fornicators in the General Assembly's records. The Assembly did not meet between 1610 and 1638, and the only information available for this period is from the lower Church courts. Certainly some acts<sup>were</sup> passed punishing fornicators with fines. In 1611, for instance, the Synod of Fife during the visitation of Kilmanie ordered that

"ilk feighter, fornicator, and prophaner of the Sabbaoth day, sall pay for ilk fault, XXs.". <sup>2</sup>

Heavier fines were enacted by the Presbytery of Ellon in 1617 - four marks for the first fault, and eight marks for a relapse.<sup>3</sup> The

1 Hair. 'Before the Bawdy Court'; 49, no.53.

2 'Synod of Fife'; 21.

3 Foster. 'Ecc. Admin.'; 143.

penalties of 1567 are not referred to in either of these cases, and the fines are considerably lower than the Act's £40 for the first fault. In the case of Marian Moderall, it is implied that the Kirk Session of Stirling saw itself as being responsible for collecting the statutory fine, at least in 1622. The Session requested the magistrates to punish her corporally as she did not pay the fine for trilapse fornication. It is significant that the magistrates were not involved until after she had been fined. Interestingly enough she was not punished according to the statute:

"Thay with advise of the brethrein of the kirk thinkis meit that for the present thay will pas over the wardein of her persone and dowking thairof according to the act of parliament, and decernis and ordanis her to be presentlie reponit to waird quhill with convenient diligence she be banesit this toun for evir".<sup>1</sup>

The Sessions still, of course, also required fornicators to make public penance. It was three days on the stool of repentance compared to a year for adultery, in Edinburgh when Sir William Brereton visited the city in 1635. Three days was also ordained by the Synod of Fife in 1639, although the period for adultery was six months.<sup>2</sup> These few references are only sufficient to show that some Church courts did punish fornication by fines, and by three appearances on the stool. The Moderall case may show also that the civil authorities were relaxing the corporal pains with the consent of the Church.

Fornication was one of the subjects considered by the Assembly when it met again. It was their pressure which persuaded Parliament to ratify the Act anent fornication of 1567 in 1647, and to pass the Act in 1649 which altered the fines to a scale graded according

1 'K.S.Reg.Stirling' (2); 463-464.

2 Brereton. 'Journal'; 33.  
'Synod of Fife'; 120.



to social rank (see 9.1.1). There are also several other relevant references, particularly the ordinance of 1644 'for uplifting and employing penalties contained in Acts of Parliament upon Pious Uses'. This ordinance shows that the Assembly regarded the responsibility of ministers and presbyteries as being restricted to ensuring the fines were collected as ordered by Parliament, but not the collection of the fine itself. It was complained that the enforcement of Acts of Parliament and the advancement of piety "is much neglected by the slownesse of Presbyteries and Ministers in seeking execution thereof". They were ordered to be diligent "by all means in prosecuting full and exact execution of all such acts of Parliament, for lifting the saidis penalties contained in the same, ...".<sup>1</sup> The distinction between civil and ecclesiastical penalties was also emphasised in the 'Overtures for the Remedies of the grievous and common Sins of the Land' of 1648. Fining was specified as a civil remedy. Although the magistrate in every congregation was answerable to the kirk session for the fine of £40 for each fornicator and a 100 merks for each relapsed fornicator, it was the magistrate who was responsible for modifying the fine according to the ability of the person to pay it. The religious penalties were restricted to penance: 3 Sabbaths for the first fault, 6 for a relapse, 26 for trilapse (the same as for adultery), and 39 for quadrilapse fornication (the same as relapse in adultery). Fines are not mentioned as being within the jurisdiction of the Church - their interest was in ensuring that the fines were collected and put to pious uses.<sup>2</sup> This, however, did not mean that the same division of responsibilities was made by the kirk sessions. For instance, in 1647 the Session of Humber ordained that

1 'G.A.Acts'; 110.

2 'G.A.Acts'; 192-193, 194.  
See also: 'Synod of Fife'; 151.

"if any servant commit fornication, whether man or woman, both of them shall pay their halyear's fee. Under the name of servants, we comprehend cottars and farmers children serving their parents. We appoint farmers falling in the like fault to pay 5 lib. for everie chaldre of victuall or for everie 100 lib. they pay to their masters. Lastlie, if heritors commit fornication we ordaine them to pay 40 lib. according to the Act of Parliament".<sup>1</sup>

The act makes no mention of the civil magistrate, and the session takes it upon itself to enact fines less than those laid down by statute. Only those of the highest social rank, heritors, are to pay in full the fine of 1567. It is also worth noting that the usual patriarchal argument that the master of the household is in the position of father to his servants is reversed: his co-residing children are liable to the same fines as if he was their master and they were his servants. The fines are much less than those set down by Parliament two years later. For instance, the Session's L5 for each farmer contrasts with the Act's penalty of L20.

It is not possible to state with any certainty what the attitude of the Church was to fornication between 1650 and 1691 when the General Assembly was reconvened. This is because the research concentrated on the records of national or central organisations rather than those of synods, presbyteries and kirk sessions. Certainly the lower courts of the Church continued to enact fines. In Banff the standard fine for fornication was L4 compared to the 6 marks for the man and 4 for the woman adopted by the Session of Elgin in 1665.<sup>2</sup> MacKenzie may well have been right

1 'K.S.Reg.Humbie'; 437.

2 Foster. 'Bishop and Presbytery'; 66.

when he said that fornication was punished only by the kirk sessions with an arbitrary fine and penance, and that the Act of 1567 was not exactly observed.<sup>1</sup>

There was one development, however, which was significant. In the Synod of Dunblane at least, fornication was no longer mentioned in particular and was included presumably under the general heading of profaneness. Other sins were mentioned specifically. In 1665 for instance ministers were ordered to put the Synodal acts into execution.

"for repression of the prevailing vices of drunkenness and swearing, and cursing and filthie speaking, and all profaneness, and for the pressing (of) familie worship, and the advancing (of) the power of godliness by all due means".<sup>2</sup>

Laws against profaneness in general had been passed before. For instance, in 1641 the Presbytery of St. Andrews passed an act for restraining vice and which was adopted for the whole province by the Synod of Fife.<sup>3</sup> The evidence is too slight to suggest that sexual sins were regarded as less serious than swearing or drunkenness. There may, however, have been some basis for the idea that fornication was no longer regarded as any more serious and possibly even less serious ~~serious~~ a sin than the other vices which were specifically condemned in the general acts.

Material becomes much more plentiful after the re-establishment of Presbyterianism and the reconvening of the General Assembly. There is the same change in direction in the acts of the General Assembly as in the Acts of Parliament. The earlier acts against profaneness of the 1660's may have influenced the Assembly's acts of 1690, 1697, 1699, 1704, 1706, 1714 and 1715 in a similar manner

<sup>1</sup> MacKenzie, 'Observations'; 177 (1686).

<sup>2</sup> Butler, 'Life and letters'; 374; see also, 366, 384-385, 386.

<sup>3</sup> 'Synod of Fife'; 124-125.

to the way in which the Act of Parliament of 1672 set the pattern for the civil Acts of 1690, 1693, 1695, 1696, and 1701. The new order in the Church made its position clear in 1694. This was almost its earliest opportunity to do so as the Assemblies of 1691 and 1692 were not printed. The act of 1694 did not ordain new penalties, either civil or religious, but restricted itself to a series of measures which emphasised the spiritual cure and prevention of offences. Fornication was just one of the many offences which the act was intended to remedy and restrain. God was dishonoured

"by the impiety and profaneness that aboundeth in this nation, in profane and idle swearing, cursing, Sabbath-breaking, neglect and contempt of Gospel ordinances, mocking of piety and religious exercises, fornication, adultery, drunkenness, blasphemy, and other gross and abominable sins and vices".

The specific enactments do not shed any light on the Church's attitude to fornication in particular. However, as this act is the first of many similar, it is worth giving in more detail than the subsequent ones which will only be summarised. The General Assembly appointed that:

1. ministers should supplicate God in prayer and have in "their hearts a deep, humbling, and soul-affecting sense of these evils";
2. ministers should plainly preach against these vices, "and denounce the threatened judgements of God against such evil-doers, and deal earnestly and much with their consciences, to bring them to a conviction and sense of their sin and danger";
3. Church courts should exercise discipline "with that gravity, prudence, and meekness of wisdom, as, by the blessing of God, may prove an effectual mean of reforming and recovering the guilty, and of preventing the like sins in others".

4. servants and those who move from one parish to another should have testimonials of their honest and Christian behaviour;
5. family worship must be performed;
6. ruling elders must be conscientious in their family worship;
7. no ignorant nor scandalous person should be admitted to communion;
8. kirk sessions should apply to the local magistrates for the application of the Acts of Parliament against profaneness, especially that of 1693.<sup>1</sup>

The Assembly is clearly stating its desire for a moral reformation on a personal level - ministers, congregation, session and heads of families. They are not content with merely punishing offenders. Specific penances are not mentioned, and civil punishments are left to the magistrate.

The Assembly was supported in its intent by the Government. The letters addressed by the monarch to the General Assembly show the Government's persistent concern with profaneness. One example is sufficient to show the general tenor of these letters. In 1697 William I/III wrote to the Assembly that

"The present juncture of affairs will not allow of your sitting long; therefore, you are to lose no time in doing what is most necessary for suppressing and restraining of vice and profanity, and in planting of vacant churches with pious and moderate ministers. This will be acceptable to us, and in doing which, you shall have all necessary concurrence and assistance".<sup>2</sup>

1 'G.A.Acts'; 241.

2 'G.A.Acts'; 257. For other examples of royal letters see: 'G.A. Acts'; 382 (1705), 421 (1708), 440 (1710), 460 (1712), 478 (1713), 485 (1714), 496 (1715), 525 (1719).

The Assembly's replies to these letters are usually as repetitive as the letters themselves and their instructions to the Commission of the General Assembly. They are usually fulsome in their praise, and in most instances stress the execution of existing laws rather than the passing of new laws. Emphasis is usually placed on the importance of employing the right kind of magistrate. There is, however, the occasional cutting note. The hyperbole is well illustrated by the 'Humble Address' of 1698:

"No expression can reach the fulness of our loyal hearts upon this great occasion, nor that sincere joy that is raised in us by the hopes of your Majesty's applying yourself, with Christian princely vigour, to maintain that holy religion (given us by the God who hath called, upheld and established you) to curb the enormities of a debauched and profligate age, and to quell the monsters of profanity and atheism, that have dared so boldly to bid defiance to heaven and all that is sacred".<sup>1</sup>

These royal letters and their replies are complementary to the continuous urgings of the Commission of the General Assembly for close co-operation with the State in enforcement of the laws against profaneness. The official attitude was to make public, ritual statements that each was concerned as the other about repressing vice. Each urges the other to take action with promises of assistance. It is a public expression of the alliance between a new government and a newly established Church who were both servants of the same God and derived their legitimacy from Him. The practical effects are another matter. Only the Act of Parliament of 1701 anent profaneness can be traced to the representations of the Assembly,

<sup>1</sup> 'G.A.Acts'; 269. For other examples, see: 'G.A.Acts'; 258 (1697), 278 (1699), 302 (1701), 318 and 321-322 (1703), 326 (1704), 383 (1705), 441 (1710), 461 (1712), 479 (1713), 486 and 492 (1714), 497 (1715), 525 (1719).

and similarly only the Assembly's act of 1697 seems to be associated with a government plea for action. It is doubtful if the General Assembly required much urging to follow its own desires.

There were two acts passed in 1697. The one of 7 January was anent family worship and renewed and ratified the act of profaneness of 1694. The second of 11 January was another act against profaneness and it included some enactments previously covered by the act of 1694, for instance, preaching against sins and the faithful and impartial exercise of church discipline. However, most of the act deals with ensuring that kirk sessions applied to the magistrates for the civil punishment of offenders conform to the Acts of Parliament of 1693, 1695 and 1696. Sessions who failed in their duty were to be censured by presbyteries or synods. Emphasis was also placed on the responsibility of presbyteries to pursue negligent or refractory magistrates before the Lords of Session according to the Acts of 1695 and 1696.<sup>1</sup> This act, like those of Parliament, did not alter penalties, but is intended to make sure that the existing acts and procedures are enforced both by the sessions in the application of church discipline and by the civil magistrates. It does lend some support to MacKenzie's view that the Act of 1567 against fornication was not exactly observed by magistrates, and that this was one of the things the Assembly was trying to remedy.

In 1699 the General Assembly again complained of the lamentable growth of profanity, ignorance and irreligion, and passed another act against profaneness. This concentrates on the quality of the ministry and Sabbath observance, especially the effect of drinking late on Saturday night in burghs. There is the usual recommendation that kirk sessions and presbyteries apply to the magistrates for

1 'G.A.Acts'; 259-260, 261-262.

the execution of the laws. The Assembly also recommended that presbyteries should be more accurate in managing their privy censures and in admitting people to the ministry, and that ministers should exercise more conscientiously their pastoral duties. The act was the result of overtures passed by the last Assembly and oral reports of commissioners from the presbyteries.<sup>1</sup>

These three acts anent profaneness of 1694, 1697 and 1699 formed the basic measures to ensure that both the Church and magistrates conscientiously fulfilled their duties. The four subsequent acts were mainly concerned with publicising the existing acts of the General Assembly and Acts of Parliament. In 1704, for instance, the Assembly appointed a commission to draft an abstract of the laws against profaneness so that it could be printed and read by each presbytery at least twice a year. It also recommended that presbyteries should send overtures to the next Assembly on what further action was required to restrain wickedness, and to make this "their chief and first work". This eventually came to fruition in the 'Form of Process' of 1730 after a period of gestation dating back to 1697.<sup>2</sup> In 1706 the sessions were reminded that they should apply to the magistrate to execute the laws against profaneness, and that they seek legal redress against neglectful or unco-operative magistrates.<sup>3</sup> These acts do not appear to have been more successful than previous ones as the act of 1714 once again complains that

"all manner of immorality does abound through this nation, to the dishonour of God and the scandal of our holy religion, which threatens us with severe strokes and judgments".

1 'G.A.Acts'; 281-282.

2 'G.A.Acts'; 329.

3 'G.A.Acts'; 395.



It was again ordered that the acts of the General Assembly and Acts of Parliament should be reprinted in a small volume, but this time it was ordered that a copy should be sent to every parish and kirk session, presbytery and synod in Scotland. It was also ordered that the royal proclamation of 1708 with its abbreviate of laws should be read from the pulpit, and a suitable sermon preached. The frequency of the readings was left to the discretion of synods and presbyteries as its too frequent reading had been found inconvenient. This act was repeated the following year.<sup>1</sup>

Fornication is noticeable for its absence from the records of the General Assembly. It was condemned as a sin, but was paid much less attention than other sexual sins like adultery and incest. The attitude of both the Church and the State appears to be that it was a filthy vice, but not abominable and offensive to nature. There is a lack of specific enactments by the General Assembly against fornication alone - the overture for the remedy of grievous and common sins of the land of 1648 is exceptional in specifying the number of appearances on the stool of repentance. The Assembly was content to leave the nature of the punishment to the discretion of the individual kirk sessions, and civil punishment to the magistrates. At the local level the sessions do appear to have taken upon themselves responsibility for fining offenders, though whether this was in addition to the penalties of the Act of 1567 is not clear. These fines were normally much lower than those specified by statute. To cite a few examples, in St.Andrews in 1599 the fine was £4, in Kilmaine in 1611 £1, and in Elgin in 1665 6 marks for the man and 4 for the woman, compared to the Act's £40 for the first fault. The penalty of £40 was probably so severe that few offenders could afford to pay. The Act

1 'G.A.Acts'; 487-488, 505.

of Parliament of 1649 redressed this situation by grading the fines according to rank, that is, ability to pay. It also seems likely that the corporal punishments fell into disuse, and on at least one occasion - Marian Moderall in 1622 - the severity of the law was not exacted on the advice of the local session. It is possible that the kirk sessions regarded the Act of 1567 as too severe in its penalties, and modified it according to their own view of the seriousness of fornication.

The severity of the Act of 1567 may also account for the lack of cooperation from the magistrates, and the tardiness of sessions in delating offenders to them for civil punishment. Graham found that in the many cases he examined between 1690 and 1730, slightly less than one out of every hundred cases for all offences was remitted to the civil authorities.<sup>1</sup> It is not surprising, therefore, that so many of the Acts of Parliament and acts of the General Assembly tried to ensure greater cooperation between kirk sessions and magistrates. The magistrates do not appear to have been interested in punishing fornication, ~~neither~~ do the kirk sessions appear to have been willing to delate offenders to them. Both seem to have felt that punishment was best left to the kirk sessions.

It was this complacency that the General Assembly tried to remedy by its acts against profaneness in the 1690's and 1700's with particular emphasis on publicising what was considered immoral and the penalties. The kirk sessions and magistrates obviously had to know what the laws were before they could enforce them. They would also be unable to excuse their negligence by ignorance. Equal stress was laid on educating potential and actual offenders. Conformity

1 Graham. 'Ecc.Disc.'; 50.

to the law would be easier if people accepted that such behaviour was immoral and deserved punishment. The Church attempted to proselytise through privy censure, penance, sermons and the printing press. The aim of the sermons prescribed by the act of 1694 was described in 1697 as to bring people to

"a conviction and sense of their heinousness and danger, and may refrain, not only for fear, but from conscience".

The purpose of discipline was to bring offenders to "unfeigned repentance and reformation" by dealing with their consciences.<sup>1</sup>

More time and effort, however, was spent by the Assembly on the procedures to be used in disciplining offenders. The work of drafting and revising the 'Form of Process' lasted for over thirty years until it was finalised in 1730. Sufficient progress had been made by 1705 for a draft to be printed and sent to the presbyteries. Fornication was included in the fourth chapter, which covered the procedures to be used in discipline, the kind of suppositions permissible, and a standard oath of purgation.<sup>2</sup> The emphasis on procedures, and codification in the acts against profaneness, is similar to the civil legislation. There is no novelty in either the definition or punishment of offences. Both Church and State legislated to improve the application of laws against forms of behaviour already defined as deviant. Fornication was just one of the many minor offences like cursing, blasphemy, and drunkenness which was included in the codification of existing law at the end of the seventeenth century. The outspoken condemnation of these offences by the General Assembly became an increasingly ritualistic phenomenon which does not seem to

1 'G.A.Acts'; 261.

2 'G.A.Acts'; 258-259, 288-289, 311, 337-338, 345-346, 407-409: and also Graham, 'Ecc.Disc.'.

derive from a feeling of abhorrence. The initial fervour of the 1690's gave way to complacency and an obsession with making rules. Fornication became filthiness and immorality instead of lechery, whoredom and harlotry.

### 9.1.3. Laws anent prostitution.

The material so far has treated fornication without any regard to the social relationships between the offenders. The distinction made is between first fault, relapse, trilapse, etc. There are some references which do mention the nature of the relationship (for ante-nuptial fornication see below), and show that not every bastard was the result of a broken courtship. For instance in 1593, mention is made in a case before the Privy Council of the custom in Arran of married men keeping mistresses.<sup>1</sup> The Burgh Council of Edinburgh also ordered in September 1560 that a search should be made throughout the town for the concubine of the laird of Restalrig and that on apprehension she should be punished by being carted through the town and banished from Edinburgh.<sup>2</sup>

The majority of the references, however, deal with professionals - brothel keepers and harlots. Acts against prostitution were left to the discretion of the burghs. There is only one act specifically against brothels by the central government, though the Privy Council's general responsibility for law and order did bring before them the occasional case involving whores.<sup>3</sup> The act was passed by the Privy Council in 1564 on the same day as other acts against fornication, adultery, and incest. Brothels were condemned as a breeding ground for vice, and the brothel keepers as,

1 'R.P.C.'; V<sup>1</sup>, 65.

2 'Burgh Recs. Edin'; III, 80.

3 eg. 'R.P.C.'; II<sup>1</sup>, 64 (1596); III<sup>1</sup>, 400 (1581); XVI<sup>3</sup>, 657 (1691).

"plane seducearis, abusaris, and alluraris of the young tendir and underfilit youth to the filthie lustis of the flesche, quhilk procuris the wrath and indignatioun of God".

Punishment for the first fault was eight days imprisonment on bread and water and whipping through the town, and for the second

fault branding on the cheek and banishment from the town. These were heavier than the penalties against fornication; for example, banishment was one of the penalties for trilapse fornication, and whipping and branding were not inflicted on fornicators.<sup>1</sup>

Burgh laws against brothels can be illustrated by the acts passed by the Council of Edinburgh. These were not an innovation made after the Reformation as in 1556 the Council had threatened to banish widows or married women commonly known as adulterers or fornicators if they dressed themselves (ie wore a hat) in the same fashion as honest men's wives.<sup>2</sup> The Privy Council's act of 1564 was probably based on Edinburgh's law of 1560 against brothel keepers, pimps and harlots as the penalties are the same in both acts. The only exception is that Edinburgh Council ordained that the third fault should be punished to death.<sup>3</sup> Other burghs passed similar laws as is shown by the punishment of Besse Symson as a harlot to Frenchmen, Englishmen and Scots. She had been apprehended in Aberdour in June 1560 and had been banished from the town after being carted through it.<sup>4</sup> Edinburgh had moderated its law by 1578 when it was statuted by the Council that harlots should be carted through the town and banished from it for as long as the Council wished.<sup>5</sup>

1 'R.P.C.'; I<sup>1</sup>, 296-297.

2 'Burgh Recs.Edin.'; II, 248-249.

3 'Burgh Recs. Edin.'; III, 65.

4 'K.S.Reg.St.Ands.' (1); 50-59.

5 'Burgh Recs.Edin.'; IV, 72.

Other measures were also taken, particularly against women who kept taverns. The Council complained in 1560 that

"the iniquitie of wemen taverneris within this burgh hes bene ane greit occasioun of huredome within this burgh; swa that it apperis ane bordall to be in every taverne".

The Council tried to cut off supplies to such taverns by threatening vintners with a fine of .10 if they failed to hand over to the bailies any woman taverner who had committed 'filthiness' and to whom they supplied wine.<sup>1</sup> A more direct approach was made in 1580 when it was forbidden for women to be employed in taverns. Masters who employed women taverners were made liable to a fine of .5 for the first fault, .10 for the second fault, and the loss of the freedom of the burgh for the third fault. The women were punished more severely: banishment for the first fault, branding on the cheeks for the second, and a whipping through the streets for the third. These are similar to the punishments for pimps and whores in 1560 and 1578. An exception was made for widows and wives of freemen who were permitted to trade in alcohol. A similar law was passed in 1650.<sup>2</sup>

There is a third series of Edinburgh laws which were intended to purge the city of miscreants and which date back to at least 1530. Landowners and householders in that year were given 16 days to evict "ony hussis vile persons or vagabondis dwellis in, that wantis husbandis to win thar lifving" under pain of 10s. The evicted people were to be banished for life.<sup>3</sup> A similar law was passed in 1566. Householders were forbidden to receive into their houses persons who had committed fornication or adultery, and were to

1 'Burgh Recs. Edin.'; III, 86.

2 'Burgh Recs. Edin.'; IV, 154-155, 186.  
Nicoll. 'Diary'; 5.

3 'Burgh Recs. Edin.'; II, 40.

inform the provost and bailies of any person who committed such crimes in their houses so that the offender could be punished conform to the Acts of Parliament. The penalties for failing to do this were much more than in 1530: £10 for the first fault, £20 for the second fault, and banishment for the third. Those unable to pay were to be imprisoned for 20 days with further punishment at the discretion of the magistrate.<sup>1</sup> Further purges of vicious persons, including harlots and whores, were attempted in 1581 and 1587.<sup>2</sup>

It was probably a suspicion of whoredom that explains why some kirk sessions were dubious about women, especially those not widows, who kept house for themselves. In 1595 the Kirk Session of St. Andrews ordered the elders and deacons to take trial in their quarters of "wemen that keipis houssis be thame selfis, nocht wedowis and on mariit". An almost identical act was made by the Session of Stirling in 1597.<sup>3</sup> In two cases the Perth Session made it clear what the women should do. In 1587 it forbade three sisters to co-reside, and ordained that

"every one of them shall go to service, or where they may be best entertained [employed] without slander, under the pain of warding their persons and banishment of the town".

Janet Watson was ordered in 1621 to either marry or go into service as she might give occasion to slander living on her own.<sup>4</sup>

These references do show that prostitution was punished more severely than fornication. The penalties of whipping and branding, for instance, were inflicted on adulterers. There are also measures

1 'Burgh Recs. Edin.'; III, 223.

2 'Burgh Recs. Edin.'; III, 214, 493.

3 'K.S. Reg. St. Ands.' (1); 806.

'K.S. Reg. Stirling' (1); 129.

4 'K.S. Reg. Perth'; 256, 301.

to deny them accommodation, and to cut off supplies for their more lawful trades. Some kirk sessions were particularly suspicious of women other than widows who lived on their own and tried to bring them within the normal means of social control (husbands/heads of households). This severity is not surprising - prostitutes were likely to be at least trilapse fornicators and adulteresses. They were also seen as corrupters of youth. For instance, in 1658 the Principal of Edinburgh University complained to the Burgh Council about the brothels near the college which threatened to corrupt the students.<sup>1</sup> It is clear that in Edinburgh there was organised prostitution with brothels and pimps, and involving pecuniary gain. That it was prostitution rather than casual sex is shown by the Council's description of women taverners in their act of 1580 as those

"quha for the particular lucre and gaines to thame selves and thair maisteris, intisis the youth and insolent pepill to sic filthines".<sup>2</sup>

Such immorality would naturally incur the strong censure of the Church, and concern the civil authorities as a matter of public order.

These acts relate to burghs - Edinburgh, St.Andrews, Stirling and Perth - and no references have been found to rural prostitution. Brothels require a regular demand for their services, and the demand in rural areas or smaller burghs may have been insufficient to support brothels. No doubt some of the trade for Edinburgh's brothels came from visitors from such areas. Recent research has uncovered one phenomenon which may be relevant in this context - what Laslett and Oosterveen call 'repeaters'. These are women who bear several

1 Butler. 'Life and Letters'; 296.

2 'Burgh Recs.Edin.'; IV, 154



illegitimate children. Also associated is the suggestion that illegitimacy was hereditary, ie. there was a greater probability that a woman would bear a bastard if she was a bastard, or if her parents or grandparents had been bastards. Laslett and Oosterveen suggest that fluctuations in the level of illegitimacy was due more to the activity, or inactivity, of repeaters than the rest of the population becoming more or less liable to illegitimacy. It is further suggested by them that these repeaters were whores, or at least their procreating activities look unmistakably like whores.<sup>1</sup>

There is evidence that these phenomena were present in some parts of Scotland in the nineteenth century. In Monigaff, for instance, two-thirds of the 42 bastards between 1880 and 1893 came from nine families. One of the witnesses to the 1897 report of farm servants said that:

"My observations lead me to the conclusion that this [illegitimacy] is to a very large extent a hereditary sin. It can be traced through certain families."<sup>2</sup>

Similar comments were made by several respondents to Cramond's circular on illegitimacy in Banff; for example,

"There are some families of which no legitimate origin can be traced.";

"The self-propagating power of this evil will partly account for its prevalence. An illegitimate daughter usually follows in the footsteps of her mother".<sup>3</sup>

No direct evidence of either 'repeaters' or 'hereditary illegitimacy' has been found in the sources used, though this does not mean that they did not exist. Only a detailed study of

- 1 Laslett and Oosterveen. 'Long-term trends'; 282-284.  
See also; Macfarlane, 'Sexual and marital regulation'; 103.
- 2 Smout. 'Aspects of sexual behaviour'; 70.
- 3 Cramond. 'Illeg. in Banff'; 49, 68.

disciplinary cases is likely to prove or disprove the existence of these two phenomena in 16th and 17th century Scotland. Fergusson did, however, record some proverbs which do refer to 'hereditary illegitimacy'. For example,

"A bastardis bastard is a fed lamb to the devill".<sup>1</sup>

All this material tends to suggest that in traditional communities there existed the equivalent to the North Wales institution of a 'good thing'. This was a woman, of any age or marital status, who had a reputation as an 'easy lay'. She was not a prostitute because there was no money payment and she chose with whom she had intercourse. Favours were made to her, however - a sack of flour or potatoes, easy terms of rent, a few drinks.<sup>2</sup>

The existence of brothels in Edinburgh and the hypothesis that similar services were available in rural areas, perhaps similar to the 'good thing', has important consequences for any discussion of fornication and illegitimacy. Little work has been done on prostitution despite it being one of the oldest professions. In traditional Western societies the prostitute existed to provide what was not available elsewhere. Where relationships between the unmarried are strictly and puritanically controlled this may be normal sexual intercourse. For instance in County Clare in the 1930's pre-marital virginity was the ideal yet "the young lads are not, or were not until recently, expected to be so pure as the girls".<sup>3</sup> The authors fail to specify where the young lads sought their experience, but an 'easy lay' or an urban prostitute is an obvious candidate. Similarly, strangers may not have access to the local women. The Burgh of Stirling passed an act in 1711 against

1 Fergusson. 'Scottish Proverbs'; MS 185.

2 Emmett. 'North Wales Village'; 107-108.

3 Arensberg and Kimball. 'Family and Community'; 206.

women fornicating with soldiers quartered in the district. The penalties - the cockstool and banishment from the burgh - are too severe to refer to ordinary fornication, and relate to whores.<sup>1</sup> Another function may have been to support birth control by abstinence. Shorter suggests in France that the husband slept with one of the servants during the period between the completion of the family and wife's menopause.<sup>2</sup> Perhaps he also slept with a prostitute. Where normal sex was more freely available, prostitution was more likely to cater for more specialist needs - those forms of sexual pleasure which society defined as perverted and which a wife would not be expected to provide.

Prostitution also provided a source of livelihood, either to augment inadequate income from lawful trades or as the only source for those who no longer had enough respectability to find a job. Nineteenth century Scottish commentators drew attention to part-time prostitutes whose numbers increased whenever the trade cycle threw millhands out of work or when the price for sweated labour sank desperately below subsistence.<sup>3</sup> Prostitution was one of the alternative forms of survival for the unmarried mother in Ireland; and it does appear that where sexual irregularities are a source of shame it may be the only occupation possible for them.<sup>4</sup> It is rather ironical that societies which strictly censure intercourse between the unmarried may create the need for prostitutes and provide the women to fulfill that need. Prostitution may also have its own advantages over other occupations - more lucrative (at least when young), independence, etc. - which would attract women.

1 'Burgh Recs. Stirling'; II, 126.

2 Shorter. 'Making of the Modern Family'; 246-247.

3 Smout. 'Aspects of sexual behaviour'; 60.

4 Connell. 'Illeg. before the Famine'; 54, 57.

But the most important point about prostitution is the attitude to sex which it reveals. To the whore fornication is an instrumental activity: it is a means to an end, and the means is subordinated to that end. Whether the intercourse gives her pleasure or is as tedious as any repetitive work is not of importance. She is interested in the benefits she receives in return for her work: her wages are of greater significance than any job satisfaction. For her client the reverse is true as the payment is the instrument towards the end of intercourse or other forms of sexual activity. He was buying pleasure or at least sexual satisfaction. The existence of prostitution is a reminder that men found pleasure in sex - it might be affectionless and emotionless, but it was still pleasure. It is not correct to suggest that in Europe before 1800 sex was subordinated to "the larger ends of procreation and the continuation of the lineage, rather than being in itself an object of joy and delight".<sup>1</sup> A prostitute in return for payment gave the client sexual gratification without the responsibilities of procreation. The client sought sex for its own sake.

### 9.1.3. Fornication and illegitimacy.

Scotland was not exceptional in punishing fornication both in civil and church courts. In England Justices of the Peace were empowered to punish sexual offenders by whipping, and to send the woman to a House of Correction for a year. The application of the law varied and the harsher penalties of imprisonment under Cromwell were avoided by a failure to convict and a dwindling of presentments. The English Church courts seem to have been relatively ineffective in the period 1590 to 1630 with a majority of cases of sexual

<sup>1</sup> Shorter. 'Making of the Modern Family'; 166.

immorality involving contumacy.<sup>1</sup> In some countries fornication remained a criminal offence until very recently. In 1930 twenty States in the U.S.A. treated habitual fornication as a crime, and a further sixteen States (plus District of Columbia and Hawaii) punished a single private act of voluntary sexual commerce between unmarried persons. The penalties varied from a fine of \$10 to \$500 and a year's imprisonment.<sup>2</sup> The kirk sessions of Scotland were also not alone in prohibiting single persons from living on their own. Laws against solitary living were passed in Connecticut in 1636 and repeated until 1750, in New Haven and Rhode Island in 1656, and in Plymouth and Massachusetts in 1668. As well as the fear of sin, vagrancy and pauperism were seen as possible consequences of solitary living. These laws, with amendments, were incorporated in the New England Poor Laws of the eighteenth century.<sup>3</sup>

Most of the recent studies of illicit sex are concerned with the frequency of illegitimacy rather than the laws against fornication and the prosecution of fornicators. The usual measure is the illegitimacy ratio ie. the proportion of bastards among registered baptisms or births. Sometimes the illegitimacy rate is used which is usually more accurate as it takes into account changes in the population at risk, ie. the number of unmarried (and widowed) women in the population. The differences these different bases make can be demonstrated using Scottish figures. In 1881/5 the illegitimacy ratio in Scotland was 8.27%, in Banff 13.62%, and in Wigtown 16.25%. This compared with the percentage of illegitimate children to the estimated number of unmarried and widowed women between the ages of 15 and 45 in 1881 for Scotland of 2.12%, for Banff 3.98% and for Wigtown 3.28%.<sup>4</sup>

1 Marchant. 'The Church'; 215, 217, 224. May. 'Social Control'; 153-154.

2 May. 'Social Control'; 204.

3 Flaherty. 'Privacy'; 177-179.

4 Smout. 'Aspects of sexual behaviour'; 63. Cramond. 'Illeg. in Banff'; 33.

These studies show that there were great regional differences in the illegitimacy ratio at any one point in time and that these differences persisted over long periods. In nineteenth-century Scotland the illegitimacy ratio was higher in the countryside than towns, though the differences between towns is also striking.<sup>1</sup> It is also clear that long term changes occurred and a decline in illegitimate fertility has been demonstrated from the 1840's for most countries in Western Europe. In Scotland the illegitimacy ratio of 9.79% in 1861/5 had dropped to 6.5% by 1901/5. Less information is available for more remote periods of direct interest to this thesis.<sup>2</sup> The longest and most accurate figures are those for England, and these show that between 1560 and 1750 the illegitimacy ratio was low (under 3.5%) but that there were sharp differences within this period. In particular the illegitimacy ratio increased 1560 to the 1590's but declined to a low (1%) in the 1650's before increasing to 1775 and beyond.<sup>3</sup> No similar figures are available for Scotland at this period though Cramond believed that the 19th century level of illegitimacy was a marked increase over earlier centuries.<sup>4</sup>

These comparative figures suggest that the incidence of fornication in Scotland is likely to vary widely between different regions and over time, but to be low compared to the nineteenth century. Before examining the slight evidence it is as well to consider two of the variables which may affect the relationship between the incidence of fornication and the incidence of illegitimacy - contraception and induced abortion/infanticide. Other variables

- 1 Smout. 'Aspects of sexual behaviour'; 63, 69.  
Laslett. 'Family life and illicit love'; 142, 146, 148.  
Drake. 'Population and Society'; 146.
- 2 Smout. 'Aspects of sexual behaviour'; 63.  
Shorter. 'Decline of non-marital fertility'; 375, 376, 378.  
Knodel. 'Bavarian Village'; 365.
- 3 Laslett. 'Family life and illicit love'; 113.
- 4 Cramond. 'Illeg.in Banff'; 13.

which will not be considered are fecundity (male and female), spontaneous abortion, stillbirths and registration as illegitimate. Marriage before the child's birth is considered in the following section on ante-nuptial fornication.<sup>1</sup>

Evidence for contraception from Scottish sources is negligible. In his 'Lectures' William Hay emphasises on at least two occasions that the birth of children must not be prevented. This implies that such methods were known, though these may refer to induced abortions rather than contraception.<sup>2</sup> The earliest definite evidence in Scotland for birth control occurs in a legal case of 1706. The woman asserted that she was married to Buchanan and had borne his child. He denied paternity, despite admitting carnal relations with her, on the basis that

"he had used such means as that he could not be the father of her child".<sup>3</sup>

Contraception has been postulated as an explanation for change in fertility in Colyton (Devon) in the late 17th century, and in Akershus (Norway) in the early 1770's. Similar arguments have been made for 18th century France.<sup>4</sup> The method used is usually assumed to have been withdrawal, although condoms are referred to in some Norwegian evidence. Sheaths of linen are mentioned in sixteenth century England though these may have been in use only in aristocratic circles, and have been intended as a preventive against venereal disease as much as pre<sup>9</sup>gnancy. Various other mechanical devices had been invented by the 1860's.<sup>5</sup> The rhythm method was certainly known in the 1830's but its effectiveness is very doubtful.<sup>6</sup> Withdrawal

1 See: Shorter. 'Decline of non-marital fertility'; 380-383.

2 Hay. 'Lectures'; 115, 133.

3 Hermand. 'Consistorial Decisions'; 69.

4 Wrigley. 'Family Limitation'; 104-105.

Drake. 'Population and Society'; 70.

5 Bloch. 'Sexual Life'; 312, 314.

6 Showalter. 'Vict. Women and Menstruation'; 84.

does appear to have been the likeliest and most effective form of birth control and is documented at an early date. There is, for instance, the now famous letter from Dr. Layton to Thomas Cromwell in 1536 describing this as one of the knaveries of the regular clergy in Yorkshire.<sup>1</sup> This may have been the method of contraception which the curate of Weaverham, Cheshire, was accused of teaching to young people in 1590.<sup>2</sup> There is no reason to suppose, despite the absence of positive evidence, that these techniques were not known in Scotland. There would be an incentive to practise withdrawal in illicit intercourse to avoid the responsibility of bastardy or the visible evidence of a pregnant woman. Withdrawal should therefore mean a discrepancy between the number of illegitimate births and the incidence of fornication.

There is more positive evidence for abortion, usually by herbal potions rather than mechanical techniques, and for the related practice of infanticide. Cases of induced abortion are included in some English Church records. Various brews in nineteenth-century Norway included needles from yew trees, ergot, saffron, turpentine, etc. There does not, however, appear to have been a widespread tradition of abortion in Ireland in the early 1800's.<sup>3</sup> There are also cases of induced abortion in the Church and secular records of Scotland. These refer to abortifacients, and the cases show that in some instances the potions had the desired effect. It is possible that these potions were part of the traditional knowledge of herbal medicine, known both to specialists who were sometimes suspected as witches, and to many

1 Wright. 'Three chapters of letters'; 97.

2 Hair. 'Before the Bawdy Court'; 238.

3 Hair. 'Before the Bawdy Court'; 81, no 150, 152, no 369; 172, no 427; 204, no 531.

Macfarlane. 'Marital and sexual relationships'; 154.

Drake. 'Population and Society'; 70.

Connell. 'Illeg. before the Famine'; 63.



other people.<sup>1</sup> The offence was not covered by a specific Act of Parliament, and only appears to have been considered by Parliament in the 1640's. The "concealling and destroying conceptions" was one of the sexual offences referred by Parliament to a committee of the Justice General and his deputed in 1647. This can be traced back to the Synod of Fife who referred to the General Assembly in 1646 the question from the Presbytery of Kirkcaldy.

"What shalbe the ecclesiastike censure of thes who give or tak drinkes for destroying of the birthe?"<sup>2</sup>

It is not clear what effect abortion had on the illegitimacy rate in Scotland as it is difficult to distinguish such cases from infanticide. Scots law did not make the distinction between destroying the foetus and murdering the child: both were included under the term child-murder. The offence was capital and appears to have been punished by hanging or beheading under the Act of 1594 against parricide until a specific Act was passed in 1690 anent murdering of children. This Act gave statutory authority to the existing presumption in law that a woman was to be reputed the murderer of her child if it was found dead after she had concealed her pregnancy and the birth.<sup>3</sup> The method of execution was at least less horrific than under the 1532 Code of criminal law of Emperor Charles V which specified death by impalement or burial alive.<sup>4</sup>

The frequency of child-murder is difficult to assess. In nineteenth century Ireland the evidence is patchy and infanticide

- 1 eg. 'K.S.Reg.St.Ands.'(1); 649-650, 653, 689.  
'R.P.C.'; XIII<sup>1</sup>, 518; I<sup>2</sup>, 211; II<sup>2</sup>, 130, 162.  
'Just.Cases'; I, 81-82.  
'Just.Court.'; I, 294-295.  
Hair. 'Before the Bawdy Court'; 77, no 140.
- 2 'A.P.S.'; VI, pt.I, 763.  
'Synod of Fife'; 147.
- 3 MacKenzie. 'Laws and Customs'; 152-154, 156.  
'A.P.S.'; IX, 195.
- 4 Werner. 'Unmarried Mother'; 29, 30.

might have been significant in some areas. The Surrey assizes dealt with about one case a year on average between 1600 and 1700, but thereafter became rarer with only 15 bills being presented to the Surrey grand jury between 1722 and 1802.<sup>1</sup> In Scotland child-murder does occur regularly. The Privy Council records between 1608 and 1691 include 66 cases to which can be added at least 10 cases referred to by Nicoll for the years 1655-1665, and a further 11 cases from the Justiciary Court records for 1661-1673.<sup>2</sup> Child-murder was probably not practised as a form of family limitation within marriage. A third of all the Privy Council references specify that the child was illegitimate - 6 fornication, 11 adultery, 6 incest and 2 adulterous incest - and in many of those where it is unknown it can be deduced that the mother was not married. Spouses are only mentioned in 3 of these unknown cases, while 10 are servants, 2 are widows, and 5 are 'daughters of'. The prospective grandmother is occasionally cited as co-defender. Child-murder (abortion and infanticide) involves the successful concealment of the pregnancy and birth, and the most likely motive for this concealment is to avoid discovery and punishment of sexual offences. Undiscovered child-murder will therefore effect both the illegitimacy rate and the number of recorded cases of fornication. It is doubtful, however, that it would significantly reduce the recorded incidence compared with the other variables such as fecundity and spontaneous abortion.

1 Connell. 'Illeg.before the Famine'; 64.

Beattie. 'Crime in England'; 61.

2 eg. Nicoll. 'Diary'; 149, 169, 175, 196, 227, 343, 432.

'Just.Court'; I, 3-5, 28-29, 64, 81; II, 141.

'R.P.C.'; XII<sup>1</sup>, 354; I<sup>2</sup>, 532, 596; III<sup>2</sup>, 129, 340; I<sup>3</sup>, 226, 589; III<sup>3</sup>, 357, 491-492; XIII<sup>3</sup>, 413, 504; XVI<sup>3</sup>, 511.

See also: 'R.P.Glasgow'; 411.

'Just.Cases'; I, 47.

Chambers. 'Domestic Annals'; II, 414.

Graham. 'Ecc.Disc.'; 156.

There are several different sources for trying to assess the frequency of fornication in Scotland. These include the views of the General Assembly and of foreigners, which will be discussed only briefly as they are equally unreliable. Travelogues suffer from the personal prejudice of the writer and from subordination of facts to Anglo-Scottish political animosities. The latter is particularly well-illustrated by comparing Thomas Kirk's original diary with the jaundiced 'Modern Account of Scotland' which transformed the hostile account of the diary into a coarse and abusive tract against Scots. Few travellers are as sympathetic or observant as Sir William Brereton, who significantly does not mention the prevalence of immorality. Sexual accusations appear to have been one of the stock items of political propaganda, especially as the English could not denounce the Scots as Papists.<sup>1</sup> The popular quotation from Sir Anthony Weldon's satire -

"fornication they hold but a pastime, wherein man's ability is approved, and a woman's fertility discovered; at adultery they shake their heads" -

is part of this tradition with the added bias of literary borrowing. The irony is that the model comes from the 'First Book of Homilies' which denounced immorality in England.<sup>2</sup>

It has been shown how Parliament and the General Assembly used the prevalence of an offence as a justification for passing legislation. This in itself is not evidence that the offence was common. Nor are the other occasions when the Assembly condemned in forceful language the prevalence of immorality. For instance, in 1588 one

1 eg. Gardiner. 'Charles II and Scotland'; 137.

2 Weldon. 'A perfect description'; 101.

Marchant. 'The Church'; 240.

See also: 'Answer to the Satire'; 315.

of the grievances complained of to the King was

"The great dissoluteness of life and manners, with the ugly heaps of all kind of sin lying in every nook and parte of this land ... and how can the wrath of God alreadie kindled be any wayes quenched so long as it hath such matter to turn upon".<sup>1</sup>

Similar denunciations of contemporary morality occur throughout the Church records. A change in historical perspective, however, is made after the re-establishment of Presbyterianism in 1690. Certainly up to the 1640's the Church regarded the past as a dark age of moral corruption and strove towards a golden age in the future. After the 'persecution' of the Restoration the ejected ministers bestowed a more glowing gloss on the morality of the late 16th and early 17th centuries. They saw their role as undoing the harm done by Prelacy and improving on the work of the Reformers. The reasons for a national fast and humiliation in 1690 illustrate this changed perspective:

"our gracious God shewed early kindness to this land, in sending the Gospel among us, and afterward in our reformation from Popish superstition and idolatry; and it had the honour, beyond many nations, of being, after our first reformation, solemnly devoted unto God, both prince and people; ... Through the mercy of God this Church had attained to a great purity of doctrine, worship, and government; but this was not accompanied with suitable personal reformation, ... We had much Gospel preaching, but too little Gospel practice; ... we were brought under the feet of strangers, and many of our brethren killed, and others taken captive and sold as slaves, yet we sinned still; and after we were freed from the yoke of strangers. Instead of returning to the Lord, and being led to repentance by his goodness, the land made open

1 'B.U.K.'; II, 723-724.

defection from the good ways of the Lord; many behaved as if they had been delivered to work abomination; ... they proceeded to sacrifice the interest of the Lord Jesus Christ and privileges of his Church to the lusts and will of men - the supremacy was advanced in such a way, and to such a height, as never any Christian church acknowledged - ...".<sup>1</sup>

The Church was dedicated to reforming morals as an integral part of its philosophy, which was reinforced by a historical perspective. Its condemnation of contemporary morals is to be expected: it was committed to an ideal and could not tolerate any deviation from its perfect standards. This was reinforced by the threat of God's wrath on the whole land if any sin went unpunished. The Church's understanding of the frequency of deviation from its norms was thus strongly biased towards over-emphasis. The Church did not view morality objectively but denounced it in strident propaganda to secure the co-operation of the State and to awaken the people to a realisation of their sinfulness. Statements that the land was deluged in wickedness should be understood as rhetoric where facts are subordinated to other objectives.

The most reliable evidence regarding the frequency of fornication is in the records of the Church courts where they survive. So far as is known no-one has attempted to use the baptismal register, in conjunction with disciplinary cases, to estimate the proportion of bastards baptised. Some work has, however, been written on the number of disciplinary cases. The available figures are given in Appendix 6 and are derived from work by Graham and Foster. The latter's are the least reliable guide as the figures are based on single years for particular parishes while Graham

1 'G.A.Acts'; 228.

examined the records of 50 kirk sessions and 25 presbyteries. This difference probably explains the diversity in the number of all cases heard per year - Graham estimates slightly over 2 per year for the sessions while Foster's sessions dealt with between 59 and 107 for all types of offences. This discrepancy is probably explained by frequent appearances for the same offence so that in any one year a court may have no new cases before it.<sup>1</sup>

The only comparable information is work by Marchant on Deaneries in Yorkshire, Cheshire, Suffolk and Somerset. Although these include a large number of parishes (230), single years are used between 1590 and 1633. None of these pieces of research are related to the population at risk so that it is only possible to discuss frequency of fornication as per parish rather than related to the number of people at risk. The English material shows the number of all presentments per parish varying between 2 and 18, but more often between 3 and 5 which compares with 2 from Graham's selection of kirk sessions from 1690 to 1730. The number of sexual offences in the English sample varies from 0.4 presentments to 4.6 per parish with an average of 3.4. This is higher than the figure derived from Graham of 1.3 per kirk session for marital-sexual offences.<sup>2</sup> The crudeness of the figures means that too much should not be read into this comparison between English Deaneries in the early 17th century and Scottish kirk sessions at the end of the 17th century. It is quite possible that the Deaneries were more populous than the Scottish parishes. The main difference is in the proportion of sexual offences heard by English and Scottish Church courts. In the Deaneries about 30% of the presentments involved sexual morality compared to 62% of

1 Graham. 'Ecc.Disc.'; 216-217.

2 Marchant. 'The Church'; 219.

offences in Graham's sample. This does appear to bear out the suggestion that the Church of Scotland was more involved with sexual morality - a large number of presentments before English courts dealt with non-conformity, recusancy, non-payment of Church dues, and non-attendance.

Fornication was the most common offence heard by the kirk sessions - 44% compared to 14% for the next most common offence of sabbath breaking. Presbyteries, as they dealt with more serious offences, heard more cases of adultery (49%) though many were still offences of fornication (40%). Perhaps more surprising is that 18% of offences before kirk sessions were for relapses in fornication, mainly double fornication as more-frequent fornicators were dealt with by Presbyteries. These figures include only those fornicators against which there was sufficient evidence. There is no way of knowing how many people avoided detection, or were only censured privately. Some may have been heard as offences of scandalous carriage if there was only rumours or gossip. It is regrettable that this material does not include the number of offences which were known because the woman was pregnant. A high proportion is to be expected as pregnancy is something that could not be argued away. But it may be very significant if nearly all the cases of fornication were those involving the birth of a bastard. It is not possible to say if fornication was high or low, or if the illegitimacy ratio was high or low. Fornication was apparently the commonest offence dealt with by kirk sessions, mainly first time offenders who did not subsequently marry but with a substantial number of repeaters and a few persistent offenders. Without some idea of the population at risk, no precise comparison with English and European figures is possible.

## 9.2. Ante-nuptial Fornication.

Ante-nuptial fornication differs from the forms of fornication discussed in the preceeding section because of a different sequence of events after intercourse. Before the birth of the bastard, the fornicating couple marry and thus alter retrospectively their original fault. In Scotland the subsequent marriage of the couple conferred legitimacy on the child. This included children who were born, perhaps several years, before the marriage. The civil law on this dates from at least the Reformation and probably earlier. For instance in 1569 the Commissaries decided that Janet Kennedy was legitimate although her parents did not marry until shortly after she was born in 1560. It was argued that

"the saide Janet then being present at the completing of the saide merriage, recognoscit and put be hir said parentis under the cainclaith in virification that hir saidis parentis maid hir perticipiant of the said merriage as use wes of befair, as ther barne, than being present, and exhibit be thame for that effect, an sua scho is lawfull dochter to thame".

However, the parents had to have been free to marry at the time when the child was conceived for the later marriage to confer legitimacy. The General Assembly accepted this in 1575 when it was decided that children conceived before a lawful marriage were legitimate.<sup>1</sup> Under Canon Law sex between the couple was still fornication until the marriage was solemnised:

"All [the doctors] agree however that those who have intercourse before the solemnisation and blessing of the marriage commits

1 Fraser. 'Husband and Wife'; I, 265.  
Anton. 'Parent and Child'; 117.  
Ashley. 'Honourable Estate'; 72.  
'B.U.K.'; I, 345.



sin in the first act, whether this is after betrothal or after marriage".<sup>1</sup>

It should be remembered that marriage, both before and after the Reformation, consisted of the free and mutual exchange of consent and that its legality did not rest on solemnisation.

The 'official' position of the General Assembly was similar to that of the Canon Law: ante-nuptial fornication was no less a sin than ordinary fornication even though the couple married subsequently. As early as 27 December 1560 the Assembly ordered that

"Publick repentance to be made be them that sall use carnall copulation betwixt the promise and solemnisation of mariage".<sup>2</sup>

No distinction is made between promise 'de futuro' or promise 'de praesenti' so that solemnisation of marriage was the act rather than a presumptive valid marriage, which made intercourse not a sin. Similar statements were made by the General Assembly in 1563, 1565 and 1566. For instance, in 1565 it considered

"What punishment salbe usit agains them that ly in fornicatioun, under promise of mariage, whilk they deferre to solemnizat, and to satisfie be publick repentance for the slander givin? Alsweill the man as the woman, sould publicklye in the place of repentance likeways satisfie on ane Sonday before they be married".<sup>3</sup>

This was probably the same penance as that for ordinary fornication. No distinction is made between a betrothal and a promise in the present which would be accepted by the Commissaries as a valid marriage. It was probably to remove the ambiguity between a marriage 'de praesenti' and solemnisation by the Church that

1 Hay. 'Lectures'; 33.

2 'B.U.K.'; I, 5.

3 'B.U.K.'; I, 76.

Fraser. 'Husband and Wife'; I, 330.

explains the attempt to make the two events coincidental. The 'official' attitude, however, was not always adhered to by the lower Church courts. In 1646 the General Assembly had to reiterate this attitude because

"in many places the publike scandals of fornication committed before marriage are not taken notice of and removed by publike confession, according to the order of this Kirk".

It was ordained that

"all married persons under publike scandall of fornication committed before their marriage, (although the scandal thereof hath not appeared before the marriage) shall satisfie publicly for that sin committed before their marriage, their being in the estate of marriage notwithstanding, and that in the same manner as they should have done if they were not married".<sup>1</sup>

The attitude of the other Church courts can be illustrated by several examples, and their acts can be used to demonstrate how far they shared the 'official' view of the General Assembly. In 1562 the Kirk Session of Aberdeen passed an ordinance which incorporates several different approaches to the problem. The first was the obvious one of ordering that

"na personis that promeisse mariage sall have carnall copulation togidder untill the time thair compleit the band".

They also required a pledge that the marriage was completed within a certain time. This was probably forty days although the manuscript is left blank at this point. More significantly a promise of marriage had to be made before the Kirk Session's clerk of the minister.<sup>2</sup> Though the language is imprecise it does

1 'G.A.Acts'; 136.

2 'Ecc.Recs.Abdn.'; 11.

appear that the Session regarded solemnisation of marriage as the act that made intercourse not a sin. This agrees with the General Assembly's decision of 1560, and also explains why it was unnecessary to define the promise as 'de futuro' or 'de praesenti'. The main remedy was apparently an attempt to bring under the control of the Session the series of events which preceeded solemnisation. The Aberdeen Session followed the official line again three years later when it ordained that

"na personis contrackit in mariage hafe carnale copulation togidder befoir the solemnization off the mariage; and gif thai do, thai sall mak thair oppin repentans, as fornicatouris, befoir thai be admittit to mariage."<sup>1</sup>

The Kirk Session of St.Andrews took similar action in 1595 when it ratified two existing statutes. The second act required a pledge of 10 at the time of contracting marriage that the couple would marry (probably meaning solemnisation) within forty days, and that they would desist from intercourse until they were married. The 10 was to be confiscated if they committed fornication, whether or not they married subsequently. Ante-nuptial fornication was to be punished as severely as fornication, as in Aberdeen. The first act is the more interesting one: it was statuted that

"if ony persoun salbe knawin to gif sklender be carnall copulatioun befoir solemnizatioun of thair mariage, quhidder thai haif maid promis or nocht, [they] salbe haldin to mak publict humiliatioun befoir thair be mariit, sitting upon the penitent stuill, betwix the pulpeit and publict place of repentans; and if

1 'Ecc.Recs.Abdn.'; 14.

the copulation be befor the contract, thair salbe punisit as fornicatouris conforme to the ordour."<sup>1</sup>

The Session distinguishes between couples who fornicated before they were 'betrothed' and those who fornicated after 'betrothal'. Both are ante-nuptial fornication but are to be punished differently. The former is regarded as simple fornication, and under the Session's act of 1593 offenders were to be punished by three appearances on the penitents' stool. The latter appears to be punished less severely by only one appearance - this at least was the punishment for a couple in 1598.<sup>2</sup> The St. Andrews Kirk Session treats the promise of marriage as a mitigating factor for penance, but not as regards the pledge for good behaviour. One appearance does conform to the General Assembly's act of 1565 but at that time only one appearance was probably the penance for ordinary fornication. The Session was deviating from the spirit of the Assembly's act.

In the seventeenth century similar action to that of St. Andrews and Aberdeen was taken by other sessions, but probably most regarded ante-nuptial fornication as less sinful than ordinary fornication. A pledge at the time of proclamation was often used as a safeguard against intercourse before solemnisation. For instance, the Kirk Session of Stirling in 1621 required a pledge of £10 while that of Stenton in 1698 asked for only 2 dollars (probably about £5 or £6 ). Penance usually consisted of a single appearance. Sir William Brereton when he visited Edinburgh in 1635 noted in his diary that

"those that committ fornication under colour of intended mariage, and after promise of mariage, are injoined to sitt uppon the stoole of repentaunce one day: ... Those other fornicatours are injoined 3 day penance in this stoole".<sup>3</sup>

<sup>2</sup> 'K.S.Reg.St.Ands.' (1); 767, 874.

<sup>3</sup> Brereton. 'Journal'; 33.

<sup>1</sup> 'K.S.Reg.St.Ands.' (1); 809, 811.

Graham found that one day was the custom in some Edinburgh churches, Borthwick, Fintray, Cleish and Barry. The 'official' attitude was sometimes insisted upon - for instance St.Vigeans Kirk Session was overruled by the presbytery in 1727 when they ordained for ante-nuptial fornication a single appearance and half the normal fine for fornicators.<sup>1</sup> The Presbytery of Dunoon also passed an act in 1692 ordaining people guilty of fornication before marriage to underly the same penance and fines as other fornicators without respect to the subsequent marriage.<sup>2</sup> There is also some evidence to show that the time when the offence was discovered - before or after marriage - also affected the punishment. The Presbytery of Hamilton was not the first when in 1704 it overtured the synod that "the severity of discipline ought to be remitted" if "the knowledge of the fact and the conviction thereof be not till after marriage".<sup>3</sup>

The evidence shows that not all kirk sessions shared the 'official' attitude that ante-nuptial fornication was as serious as ordinary fornication. Both may have been equally sinful, but ante-nuptial fornication was sometimes punished more lightly, as the existence of a marriage contract, whether in words of the present or future tense, mitigated the offence.

This was not unique to Scotland. In New England fornication after betrothal was generally punished only half as severely as fornication between an uncontracted couple. The difference was as much as a quarter in Plymouth colony, though in some individual cases the penalties were severe.<sup>4</sup> In most of the cases the

1 Graham. 'Ecc.Disc.'; 148, 149.

2 Hair. 'Before the Bawdy Court'; 170, no.422.

3 Graham. 'Ecc.Disc.'; 150.

See also: 'Synod of Fife'; 136-137 (1643).

Fraser. 'Husband and Wife'; I, 331 (1645).

4 May. 'Social Control'; 196.

Demos. 'Little Commonwealth'; 158.

Hair. 'Before the Bawdy Court'; 190, no.486; 194, no 500.

significance of the contract or subsequent solemnisation is not made clear: the inference is that this was a mitigating factor otherwise it would not have been mentioned. That this was not always the case is shown by Massachusetts in the 1640's where such facts, though recorded, made no difference to the amount of the fine. The same variation existed in England - the acts of the Archdeaconry of York for 1613 exacted the full rigour of penance while the Cleveland Archdeaconry acts for 1632 and 1634 show that ante-nuptial fornicators were more leniently punished by a private confession or the performance of penance in ordinary clothes rather than in a white sheet.<sup>1</sup> In England the offence was finally abolished by an Act of Parliament of 1788 for reforming the ecclesiastical courts which prohibited proceedings after marriage, though in theory this did not forbid punishment if the offence was proven before marriage.<sup>2</sup> The wavering between lenient and equally severe penalties does not appear to have been due to social changes, rather it depends on what kind of evidence is used - enactments, or individual decisions - and the success of the Church in persuading its own courts to implement the official attitude. The frequently lenient treatment of ante-nuptial fornication is not peculiarly Scottish, and any explanation has to be equally applicable to England and New England.

The frequency of the offence is also relevant to any explanation. The usual measure is the number of women pregnant at the time they were married, that is, when the marriage was solemnised in church

- 1 May. 'Social Control'; 183, 185.  
Powell. 'Marriage'; 332-333.  
Greven. 'Four Generations'; 114.  
Marchant. 'The Church'; 137.
- 2 May. 'Social Control'; 170.

rather than the exchange of consent. Some figures are available for Scotland, though only for the nineteenth century. Strachan traced 84% of all first births of marriages for 13 rural parishes from different parts of Scotland between 1855 and 1869. In 37% of marriages the child was born within six months. The total of 493 children compares with 1206 illegitimate births for the same parishes, and for both the vast majority of mothers were working class. He also demonstrated the variation between Highland and Lowland parishes - four parishes in Rosshire produced 15% and 4 parishes in Aberdeenshire and Banff 65% for births within six months for working class marriages, which compares with illegitimacy ratios of 5% and 24% respectively.<sup>1</sup>

Comparable figures are available from other countries. In different deanery groups in different parts of Norway for 1855-6 the proportion of marriages where children were born within 4 months varied from 9% to 22% for Class I (propertied) and 9% to 30% for Class II (propertyless), and for 8 months 18% to 35% for Class I and 19% to 43% for Class II. Knodel provides bridal pregnancy figures for the Bavarian village of Anhausen between 1692 and 1939 - for 1692 to 1749 14% gave birth within  $8\frac{1}{2}$  months and for the whole period the highest incidence was among labourers' wives (29%). Figures for England also show that the proportion of pregnant brides was substantial with figures of 30% or 40% not being unusual. This pattern of behaviour probably dates back to at least the thirteenth century.<sup>2</sup>

1 Smout. 'Aspects of sexual behaviour'; 68, 70.

See also: Cramond. 'Illeg.in Banff'; 35.

2 Drake. 'Population and Society'; 147.

Greven. 'Four Generations'; 113.

Hair. 'Bridal pregnancy'; 237, 239-240.

Hair. 'Bridal pregnancy further examined'; 60.

Homans. 'Eng.Villagers'; 166.

Knodel. 'Bavarian Village'; 367.

Laslett. 'The World We Have Lost'; 148.

Laslett. 'Family life and illicit love'; 130.

Williams. 'Gosforth'; 64.

Most of these works suffer from the difficulties of tracing births, the use of baptismal entries, the inclusion of remarriages, etc. All these factors, however, should not be sufficient to negate the main conclusions. These are that ante-nuptial pregnancy -

1. increased in the eighteenth century;
2. varied between different areas;
3. varied in parallel with illegitimacy rates;
4. was more common among the working/labouring class of property-less than among farmers, craftsmen or propertied persons;
5. pregnant brides were not significantly younger on average than brides who were not pregnant.<sup>1</sup>

Bridal pregnancy remains a common phenomenon. The probability of pregnancy at marriage has been shown to increase the lower the social rank of the women, but is related to a younger age. Modern work also suggests an association between bridal pregnancy and a higher probability of marital breakdown.<sup>2</sup>

It remains to be demonstrated how far these general conclusions are applicable to Scotland in the 16th and 17th centuries. One difficulty is the tradition of keeping registers of proclamation rather than solemnisation, and possibly another is the refusal of baptism until the parents had made penance. The only Scottish figures available for this period are of a different kind. These are less trustworthy than figures for bridal pregnancy as the total number of brides is not known. A breakdown of the different

1 eg. Knodel. 'Bavarian Village'; 367.

Hair. 'Bridal pregnancy further examined'; 64-65.

2 Coombs et al. 'Premarital pregnancy'; 814-815, 818.

Whelan. 'Temporal relationship'; 399, 405.

Christensen. 'Cultural relativism'; 33, 36, 39.



categories of disciplinary cases provides a comparison only with the incidence of other disciplinary cases and is not related to the numbers at risk. In Graham's sample of offences heard by kirk sessions 1690-1730 (Appendix 6), ante-nuptial fornication is one of the most common offences. 9% of all offences were of this nature, and was only exceeded by fornication (44%) and sabbath-breaking (14%). Some cases were serious enough to be heard by presbyteries. The total number of offences of ante-nuptial fornication is, however, low - 226 for a total of 1,117 years. This suggests that either bridal pregnancy was exceptionally low in Scotland, or that most offenders went unpunished or were censured privately. The latter is probably the most likely explanation, and suggests that kirk sessions were not the stern, omniscient inquisitors of popular belief. Possibly the Scottish church courts were in practice closer to the English ecclesiastical courts as regards the punishment of fornication before marriage. Hair has argued on several occasions that only a minority of offenders appeared before the English courts, and only when the offence was particularly flagrant, or when individual clergy were abnormally strict, or when offenders had incurred the malice of churchwardens.<sup>1</sup> Macfarlane has shown that of the 12 pregnant brides traced in the parish registers for Boreham and Little Baddow in Essex 1560-1599, only half were presented at the archdeaconry court.<sup>2</sup> It is possible that a similar discrepancy between incidence and punishment existed in some of the New England colonies.<sup>3</sup>

1 Hair. 'Bridal pregnancy further examined'; 69.  
Hair. 'Before the Bawdy Court'; 25.

2 Macfarlane. 'Marital and sexual relationships'; 112-113.

3 eg. May. 'Social Control'; 192, 200.

Ante-nuptial fornication was officially a sin and liable to the same punishment as simple fornication. The Church found it difficult to enforce this view on its own courts yet alone on its members. There is a distinction between a theologically derived attitude and an attitude based on the social implications, particularly the mitigation of the offence by subsequent marriage. Strahan's evidence to the Royal Commission of 1868 on the Law of Marriage can probably be applied to earlier times and to other countries:

"the general feeling among the working classes is that if they are afterwards married there has been no sin; there is no scandal, no shame, no disgrace and consequently they feel that there has been no sin".<sup>1</sup>

The social basis for this distinction will be discussed in the next section as it is an integral part of the social explanation for the condemnation of fornication.

What needs to be more fully discussed is the definition of the offence, and its relationship if any to the legal proofs of marriage (see 5.2. and also 4.5.). Ante-nuptial fornication is sexual intercourse by a couple between their promise of marriage and the solemnisation of that marriage by the Church. It has been suggested that 'consummation' after betrothal was frequent, if not normal, and that it may have been an accepted part of the marriage process which culminated in its public celebration and confirmation in church.<sup>2</sup> The Church of Scotland in its rulings cited above define the offence as intercourse between the promise of marriage and solemnisation. This is confirmed by individual cases before the Kirk Session

- 1 Boyd. 'Theological Presuppositions'; 102.  
Cf. Smout. 'Aspects of sexual behaviour'; 79-80.  
Hair. 'Bridal pregnancy'; 239.  
Williams. 'Gosforth'; 65.
- 2 Hair. 'Before the Bawdy Court'; 232.  
Laslett. 'Family life and illicit love'; 128.

of St.Andrews where expressions such as 'fornication under mutual promise of marriage', and 'lying with his party before solemnisation' are used. A distinction is not usually made between a promise 'de futuro', a promise 'de praesenti', proclamation of banns, or a distinction between private and public promises.<sup>1</sup>

The service in church (see 4.6.) consisted of two events: the exchange of consent in words of the present time and God's blessing. The blessing was the only part of the service which was essentially religious and could not be legally performed without a minister of the established Church. Solemnisation did not affect the validity of marriage, only whether it was regular or irregular, and in fact a promise 'de praesenti' could precede solemnisation by 40 days or more. The Church of Scotland, however, regarded intercourse by the couple as illicit or unlawful until the marriage received God's blessing, and hence punished it as ante-nuptial fornication. It should be remembered that fornication does not refer only to sex between unmarried people, and that therefore the cases of ante-nuptial fornication where the couple have already exchanged present consent do not imply that the Church of Scotland refused to recognise the validity of that marriage. The vagueness of the references to the contract are typical: it is not clear that betrothal meant a promise 'de futuro' rather than a promise 'de praesenti'. Hair in fact argues that a betrothal was not a future intention but the actual exchange of consent in words of the present time.<sup>2</sup> Betrothal may have meant something very different from an engagement - it was the event which actually made the marriage - and thus there would be no reason for amazement at couples cohabiting between the time of their betrothal

1 'K.S.Reg.St.Ands.' (1); 171, 232, 407, 414, 874.

2 Hair. 'Before the Bawdy Court'; 239.

and the solemnisation of marriage. The system of banns would be compromised as the asking of impediments would be too late if consent had already been exchanged. It is therefore not surprising that the Church tried to make the handing in of banns coincide with the betrothal, and to make the betrothal a promise 'de futuro' in front of witnesses.<sup>t</sup> The implication is that the measurement of bridal pregnancy using the date of the solemnisation of marriage in fact measures ante-nuptial fornication before solemnisation and not fornication before a valid marriage. It may be an advantage that the Church of Scotland kept registers of proclamations, which, in itself is a reflection of the relative importance of betrothal compared with solemnisation. The argument that betrothal was often a promise 'de praesenti' also negates the view that engagements were often assumed to permit cohabitation, and may modify the Anglo-French differences in statistics of bridal pregnancy.<sup>1</sup>

An engagement or a promise 'de futuro' was an important event in its own right both before and after the Reformation. It placed the couple in a new status which was neither single nor married (see 3.2 and also 4.3). Though the couple's sexual relations were considered as serious as simple fornication, intercourse with a third party was technically adultery. This was based on scriptural authority and the risk of denying lawful heirs their rightful inheritance. No disciplinary case involving this form of adultery has been traced so far.<sup>2</sup> The promise of marriage was as binding as any other contract and the parties could be pursued to exchange consent 'de praesenti' and to solemnise their marriage. Intercourse

1 Laslett. 'The World we have lost'; 148-154.

2 Deuteronomy XXVIII, 30.

Demos. 'Little Commonwealth'; 96.

MacKenzie. 'Laws and Customs'; 170-171.

after engagement made the contract more binding and it could not be broken by just one of the parties. In addition proof of a promise 'de futuro' and subsequent intercourse was interpreted in civil law as implying consent 'de praesenti'. Fornication before solemnisation was therefore not something to be done if one of the parties intended to break the contract. It is possible that it was an incentive for ante-nuptial intercourse on some occasions as it made a promise 'de futuro' potentially as binding as a marriage contract.

This cursory review of material discussed in more detail in earlier sections does throw some light on a fundamental aspect of ante-nuptial fornication which has often been ignored. Few studies have attempted to define exactly what deviant behaviour was punished as ante-nuptial fornication, or its relationship to the subsequent marriage. Too frequently the assumption is made that a marriage only became legally valid at the time of its solemnisation in church, and that solemnisation was essential for the validity of a marriage. In Scotland this assumption is not correct either before or after the Reformation. A distinction can therefore be drawn in cases of ante-nuptial fornication between intercourse following a promise 'de futuro' which created the presumption that a valid marriage existed, and intercourse following a promise 'de praesenti' but before solemnisation. The promise 'de futuro' could vary between a formal written contract of engagement to an informal understanding between a courting couple. It is possible that figures of bridal pregnancy measure fornication after marriage and disciplinary cases fornication after engagement. This may be difficult to test because the sources are usually imprecise as to whether the promise was 'de praesenti' or 'de futuro', but the distinction may partly explain why in some places, for instance England, there is such a great discrepancy

between the figures from these two sources. It may also explain why couples were apparently willing to undergo penance for the offence - it was a relatively cheap way of receiving public affirmation and the Church's confirmation that an actual valid marriage existed rather than just a presumption which might be challenged in expensive law suits before the Commissary Court. Furthermore, the disciplinary cases could be expected to increase, all other things being equal, if the Church was successful in enforcing its view that the proclamation of banns should coincide with the promise 'de futuro' and solemnisation with the promise 'de praesenti'. Its ultimate success in this explains why it is so easy to assume that a marriage could not be valid until it was solemnised. But this is too simplistic as all other things were not equal - bridal pregnancy appears to have moved in parallel with illegitimacy, tolerant attitudes towards both were often present together, and it was disciplinary cases which decreased and bridal pregnancy which increased in the late seventeenth century in England. What needs to be studied further is exactly what was the offence of ante-nuptial fornication and whether its definition changed over time.

### 9.3. Discussion.

Sexual intercourse was regarded as sinful unless it took place between a married couple, and even then it could be sinful if their motives were improper. The condemnation and punishment of fornication by society, however, was not based solely on theological grounds. There were social reasons for punishing fornication and these were probably paramount. The social problem was not fornication but bastardy. The lack of distinction between the two is probably a reflection of not considering sex as something different from procreation, and of not distinguishing between the act and its

possible consequence. Similarly most modern studies discuss illegitimacy as if it was synonymous with fornication. A bastard cannot be ignored and poses problems for the different forms of social relationships within society. The difficulties may be particularly acute in patrilineal societies, especially those where status is ascribed rather than self-achieved. (Status placement is here regarded in the broad sense of an individual's relations with other members of society rather than in the narrow sense of hierarchical position.) This applied even when the father was known - legitimacy and its benefits were more than knowing parentage. For instance, the bastard had no right of inheritance and the law jealously guarded the rights of the lawful heirs. The effect this had on the attitude to adultery has already been discussed (see 8.6.). There was also the general rule that a widow should not remarry until a year after her husband's death if she thought she was pregnant.<sup>1</sup> The different kinds of relations are revealed by Hay when he explains why 'fleeting unions' are repugnant and contrary to the welfare of the child, family and state. He uses the absence of those social responsibilities which were ideally present in a regular union. These include the "strong and loving union" which bound the family together, the mother's responsibility for rearing the child and the father's duty to instruct and educate, and the child's duty to care for parents who were aged or infirm. He claims all these would not exist if the parents were uncertain. He stresses furthermore the importance of kinship for the whole community and claims that consanguinity and affinity would not be known if intercourse were adventitious.<sup>2</sup>

In Scotland the family was probably basic to the way society was organised, and any behaviour which did not conform usually challenged

1 Hay. 'Lectures'; 249.

2 Hay. 'Lectures'; 37.

ways of holding property, distributing wealth and political power, transmitting land from one generation to another, the forms of economic activity, etc. There were good pragmatic reasons for discouraging fornication and the religious-ideological reasons provided additional legitimacy by seeing it as God's law. Officially the bastard was in a position analagous to the modern stateless person. For instance, until 1836 bastards had no clear legal power to dispose of their property by will or by gift.<sup>1</sup>

At the time of birth there was little chance of avoiding the question of how to provide for a bastard's upbringing. There were other reasons for discovering the name of the father than the justice of punishing both the man and the woman. In Scotland, if paternity was proved, the **father** had to contribute towards the cost of confinement and the maintenance of the child until the age of seven.<sup>2</sup> Provision for the child was more than legal and moral principles. Certainly in England few bastards survived infancy and in Anhausen, Bavaria, the percentage of illegitimate live-born infants that died within one year was nearly 39% for the period 1692-1749.<sup>3</sup> This may be a reflection of the class bias in bastardy. In a study of illegitimacy in the United States in the 1950's and 1960's the disadvantages experienced by bastards - such as a higher disease and death rate, and a less adequate education - was explained as the combination of legal stipulations, class position, the lack of adequate parental care, and social customs that are social obstacles to opportunity.<sup>4</sup> The care taken by kirk sessions to discover

1 Ashley. 'Honourable Estate'; 70.

2 Anton. 'Parent and child'; 123.

Cf. Homans. 'English Villages'; 164.

3 Laslett. 'Family life and illicit love'; 160.

Knodel. 'Bavarian Village'; 365.

4 Goode. 'The family'; 25.



the father does not necessarily imply a harsh, inquisitorial attitude to fornication. It can be interpreted as an attempt to ensure that fathers did not evade their social responsibilities and that provision was made for the well-being of the child. The weight of the responsibilities may also help to explain why the session was so careful as to the evidence of paternity.<sup>1</sup> The session's attempts compare favourably with the father's evasion of responsibility and its consequences for the mother and child in Ireland in the first half of the nineteenth century where there was little toleration of the fornicator. In Scotland, and for instance in North Wales, an attempt was normally made to bring the bastard back into a family situation, even if it meant fostering or rearing by the grandmother.<sup>2</sup>

Fornication and bastardy were not, however, universally condemned, and this requires an explanation. The incidence of bastardy itself may show that the 'official' attitude was rejected, or perhaps accepted but ignored nevertheless. People do not always do what they know or believe is right. A test of attitude is the possibility of the marriage of the mother to someone other than the father. In Ireland she was unlikely to marry unless she married beneath herself, or unless there were compensations like land or money. The latter recalls the alternatives if a man deflowered a virgin - marriage, or a dowry. In contrast in the chapel community of Llan having an illegitimate child was no bar to marriage, though the choice may in some cases have been limited.<sup>3</sup> Though there is no information on this aspect for seventeenth century Scotland, there is evidence that in some areas in the nineteenth century little

1 eg. 'K.S.Reg.St.Ands (1)'; 42, 232, 391, 565.  
'B.U.K.'; I, 180-181.

2 Connell. 'Illeg.before the Famine'; 58-59, 61.  
Emmet. 'North Wales Village'; 104.

3 Connell. 'Illeg.before the Famine'; 55, 56, 57.  
Emmet. 'North Wales Village'; 104.

shame was attached to the mother. For instance, Strahan reported to the Royal Commission of 1868 on the Law of Marriage that

"it is very frequent to marry a woman that has a child by another man; the only objection is the burden of the child; the burden of the child may be an obstacle, but the disgrace would be none".

Several replies to Cramond's survey supports this view: for example, a newspaper editor said that

"a girl who has had a 'misfortune' is hardly considered a bit less eligible in the matrimonial market".<sup>1</sup>

The nineteenth century material for Scotland confirms that attitudes to the subsequent marriage of the mother were probably related to attitudes towards bastardy. It is significant that the evidence is not based on official attitudes, but the recorded comments of people whose children, friends and relatives bore the bastards. This is in contrast to the sources used in this thesis which relies on statements made by official organisations of the State, most of which were either made publicly or intended for publication. In Banff at least the bearing of a bastard was apparently seen as less shameful than stealing. For instance, a Free Church Minister reported that

"A woman once said to me with reference to her erring daughter, 'It was not so bad as if she had taken twopence that was not her own'. That woman was a fair type of the average church member in this district, neither better nor worse".<sup>2</sup>

A modern study of a Welsh village shows that the discrepancy between the firm 'no' of church and chapel and actual behaviour and

- 1 Boyd. 'Theological Presuppositions'; 101.  
Smout. 'Aspects of sexual behaviour'; 71.  
Cramond. 'Illeg.in Banff'; 45-46, 49, 52.
- 2 Cramond. 'Illeg.in Banff'; 46, see also 49, 50.

attitudes, including that of church-goers, is not restricted to parts of Scotland in the 1880's.<sup>1</sup>

The reasons for the toleration of fornication and bastardy are probably derived from the same factors that explain their condemnation. These are principally sociological and not theological, and are better understood if fornication is divided into different types. Some modern studies have attempted a breakdown, for instance, work by Reiss and the more grandiose attempt by Shorter.<sup>2</sup> Goode produced a list of fourteen types of illegitimacy ranked according to the increasing degree of likely social disapproval. His categories are not based on legal and formal definitions which can change. For instance, the effect of marriage laws on illegitimacy has been studied for Germany in the nineteenth century, and a further example is the acceptance of clerical marriage.<sup>3</sup>

The classification below excludes adulterous and incestuous relationships. This is because these are not discrete to the specific categories: consensual union may be adulterous or incestuous, or both, or neither. The marital status of the parties and their kinship relationship is an additional complication which can be added.

The categories are:

1. consensual union-cohabitation.

This is couples who live together as if they were husband and wife, but who have not had their union solemnised by the Church. There are two main sub-divisions. The first is where the couple have not exchanged a public promise, the most likely reason being

- 1 Emmet. 'N.Wales Village'; 102, 103.
- 2 Reiss. 'The family system'; 156.  
Shorter. 'Sexual revolution'; 243-247.
- 3 Goode. 'The family'; 23.  
Knodel. 'Law, Marriage and Illeg.'; 289, 291.  
Knodel. 'Bavarian Village'; 366.  
Donaldson. 'Scot.Ref.'; 15.

that they were not lawfully capable of contracting marriage. For instance, the man may have deserted his wife so that the cohabitation was bigamous and adulterous. Any off-spring would be illegitimate unless the Commissary Court accepted cohabitation as proof of an implied promise 'de praesenti' (see 5.2.1.) and the couple were lawfully capable of marriage. The local community may regard the couple as married and any offspring as legitimate. The second, and probably more common, is where the parties had exchanged consent, either 'de praesenti' or 'de futuro', but did not proceed to solemnisation and did not intend to either. The children would normally be regarded as legitimate, though some cases may shade into the first sub-division and require legitimacy to be proven by promise 'de futuro' and subsequent intercourse. An example is provided by an act of the Synod of Aberdeen in 1668:

"quhatever persones doe cohabit togidder as married, alledgeing that they have privatlie plighted faith one to ane uther, but it is found that ther was no intimatione of ther purpose to the congregatioun, nor the marriage solemnized nor blessed by any minister, the persones that have so cohabited shall be censured as fornicators, and be procest as converseing in uncleannesse, ay and whill they separat one from ane uther, and having removed the scandall as is appointed, be lawfullie married according to the order of the Church".<sup>1</sup>

This sub-division would probably include most cases of irregular marriage, and usually the couple would be regarded as married by the community and legally recognised as such. It is, however, distinct from cases of ante-nuptial fornication.

1 Fraser. 'Husband and Wife'; I, 329-330.  
Cf. 'Statutes'; 267-268, app.II, xxiii, no.10.

## 2. mistress.

This covers cases where the relationship endures for some time, but the couple do not usually cohabit. The man normally supports the woman. It is monogamous prostitution. Often the man recognised his paternity and provided for the child to a certain extent. Any offspring is illegitimate. This type is usually associated with the upper ranks of society as by definition it requires wealth to maintain the woman. Some of the relationships will be adulterous and most will be cross-class and perhaps cross-generation. The taking of mistresses by landowners or tradesmen from the daughters of their tenantry is an example. The relationship is usually not permanent and the ex-mistress may be given in marriage to someone of her own class.<sup>1</sup>

## 3. ante-nuptial.

The child is usually born after the marriage of the parents and is therefore legally legitimate. The couple would be normally of the same class and generation. This category is closely related to the control of courtship. Two types can be distinguished according to the temporal relationship of the sequence of events. The first is where both parties agree that they will marry, and intend to solemnise their marriage. The agreement may vary from an understanding to a formal betrothal. The fornication occurs after betrothal and the child is normally born after solemnisation, but sometimes before. The couple may cohabit but it differs from consensual union in that they intend to solemnise the marriage and any cohabitation before solemnisation is regarded by them as temporary. It is equivalent to Laslett's betrothal licence: "the partners have decided on marriage and engage in intercourse in

1 Cf. Smout. 'Aspects of sexual behaviour'; 57.

confidence that a wedding will take place".<sup>1</sup>

The other sub-division is where betrothal and/or solemnisation takes place after fornication, but at the time of intercourse at least one of the parties is not contemplating marriage. The child is either born legitimate, or legitimised after birth by subsequent marriage. A form of this is the 'vagina trap'; that is, the woman wants to use her pregnancy to ensure that the man marries her. It can be described as manipulative sexuality, though that does not exclude the woman loving the man and therefore being expressive sexuality on her side as well.

This form of fornication was noted by some past observers. For instance, many returns made for the Free Church's 'Religion and Morals' report of 1866 stated that

"in those parts of the country where it [illegitimacy] is prevalent the people hardly regard it as a sin. They seem to think that marriage covers all; and there is every reason to believe that in many cases young women yield to sin, from regarding that to be the best way to secure marriage".<sup>2</sup> In the West Indies this form of fornication is a definite part of the courtship pattern, and is repetitive. The woman gambles that a more permanent union will grow from one relationship or another. In that society it is the only form of bargaining available to those women.<sup>3</sup>

Viewed from the man's side this is commonly known as a 'shot-gun' marriage, though it should be recognised that in some cases neither party may wish to marry. One variation of this was the acceptance by the Church of Scotland in the 1560's of deflowering

1 Laslett. 'Family life and illicit love'; 128.

2 Boyd. 'Theological presuppositions'; 76.

3 Goode. 'Illeg.in Caribbean'; 30.

a virgin as a claim to marriage. Society ensured that the pregnancy resulted in the least possible social disruption. Persuasion could come from the prospective grand-parents, other relatives, neighbours, the couple's peer-group, etc.<sup>1</sup> Laslett associates this with most births before the mother was aged twenty.<sup>2</sup> Where a subsequent marriage did not occur, the child would be illegitimate.

#### 4. adventitious.

This is fornication between a couple who have no intention of marrying, and community pressure fails to produce a subsequent marriage to legitimise any offspring. It is distinct from prostitution as there is no payment in goods or favours, and is usually between people of the same class and generation. An Episcopal Church minister thought this form of fornication common in Banff:

"I do not think that in one case out of every six that I have to deal with, has ever marriage been referred to or looked to by the woman".<sup>3</sup>

The problem that has been posed for adventitious intercourse is what was the motive as it took place outwith marriage and probably without the intention of offspring. Shorter has suggested that expressive sexuality, sub-divided into 'true love' and 'hit-and-run', was rare before 1750. He associates 'hit-and-run' illegitimacy with a new concept of self, the dismantling of sex-role barriers, and a reduction in the effectiveness of social controls caused by a shift in supervision of couples from the community to the couple's peer group. This is used as an explanation for the very large increase in illegitimacy in Europe 1790-1860. His 'true-

1 eg. Connell. 'Illeg.before the Famine'; 54.

2 Laslett. 'Family life and illicit love'; 128.

3 Gramond. 'Illeg.in Banff'; 47.

love' illegitimacy comes to the fore after 1875: the psychological orientation of the couple is the same as in the 'hit-and-run' situation but it is more likely to result in subsequent marriage as social controls have been strengthened by the re-integration of society, through for instance the development of stable communities and a cohesive lower-class subculture.<sup>1</sup> Shorter's basic argument is that sex for pleasure was not common until the spread of the modern concept of self-gratification and self-realisation. Arensberg and Kimball's work supports this as they concluded that "sex without familism seemed beyond the country people's imagination". Motives for immorality were greed for land and dowries, and the method was the impregnation of girls to force marriage. No recourse was made to concepts of a search for pleasure or the overpowering force of emotion. However, this applied only to farmers who cannot be regarded as lower working class.<sup>2</sup>

If Shorter is right in his suggestions, there should be little Scottish evidence from the period being studied for the idea of sex as pleasure, or sex without familial and procreative intent. The evidence seems to support him. Theology emphasised that only sex within marriage was not sinful, and that intercourse was primarily for the purpose of procreation (though this does not mean it was not pleasurable at the same time). The official attitudes to various forms of fornication - incest, adultery, ante-nuptial fornication - can only be understood in familial terms. However, all this is one sided - it was the Church's and State's view of what should happen and not the actual behaviour and attitudes of those bearing the bastards. There is some evidence, for example individual

1 Shorter. 'Sex.revolution and social change'; 243-247.

Shorter. 'Making of the modern family'; 82-84, 166-167.

2 Arensberg and Kimball. 'Family and community'; 203.



cases of irregular marriage and suits for divorce on grounds of impotency, that there were ideas of 'love' and sexual pleasure. It is possible that our views on sexuality in pre-industrial societies are distorted by the kind of documentation that has survived. It is equally plausible that the official attitudes revealed by these sources are not the same as those of most of the people. This is supported by the Church's propaganda campaign which included exhortations on the purpose of marriage at the time of solemnisation and attempts through the discipline exercised by kirk sessions to persuade offenders of the sinfulness of their action. The Church is unlikely to have been so persistent if they were preaching to the converted.

#### 5. master/mistress-servant.

This kind of fornication is not necessarily discrete from the types discussed above. It is more properly a sub-division of adventitious fornication distinguished by the co-residence of the couple and the greater status distance between them. A mistress would usually be maintained in a separate residence, and would not be socially subordinate to the head of the household. If the hypothetical familial structure described in the second chapter is valid, the master or mistress is likely to be married and the servant single. Not all cases may be single adultery, however, as the master or mistress may be widowed. The social distance between the couple is not one of class - if the assumptions are correct the distance in many cases is between different stages of the same life-cycle and the couple may be of the same endogamous group. Again if the traditional household is viewed as a form of 'family' intercourse between the co-residents may be regarded as similar to incest.

It is probable that this form of fornication was much rarer than either adventitious or ante-nuptial fornication (though Shorter sees it as prevalent as the end of the seventeenth century gave way to the eighteenth). The consequences were likely to be greater as there was a greater probability of adultery. There was also likely to be less opportunity for concealment from the rest of the household as domestic arrangements did not permit any great degree of privacy, though no doubt this obstacle could be overcome. No historical material has been found on the status distance between fornicating couples. The slight evidence on paternity for bastards in nineteenth century Scotland, however, does suggest that at least in that period bastards were most likely to be fathered by servants and not by masters.<sup>1</sup>

#### 6. prostitution.

Some of the Scottish laws against prostitution have already been discussed above (see 9.1.3.). Its distinctive feature was the exchange of money and goods in return for sex. There was probably considerable variety in its forms, ranging from the organised brothels of towns to the rural 'good thing'. Prostitution is the only type of fornication that was an occupation, though it was often combined with other trades, for instance tavern keeping, or used to earn pin-money. It was often adulterous and across class lines.

Fornication was probably tolerated or condemned according to the social context of the intercourse, and the potential social disruption caused by the subsequent birth. Social attitudes may have been much more diverse than the theological division of illicit intercourse into adultery, incest and fornication. Punishment was related to the specific offence. Thus the least disruptive types of fornication - cohabitation as man and wife, and ante-nuptial - were more likely to

1 Shorter. 'Sex.revolution and social change'; 245-246.

Smout. 'Aspects of sexual behaviour'; 68.

Cramond. 'Illeg.in Banff'; 27-29.

be lightly punished or were possibly ignored. Cohabitation was to all intents and purposes as socially acceptable as a solemnised marriage as the couple fulfilled the obligations that were associated with marriage. Bigamy was different as the bigamous party probably did not meet his responsibilities towards the deserted party. Ante-nuptial fornication was often only the anticipation of conjugal rights and the subsequent marriage removed the threat of social disruption. These forms of fornication were unlikely to lead to illegitimacy. Mistress, adventitious, master-servant, and prostitution were, however, likely to lead to bastardy. The father of an illegitimate child could only provide support for the child by transferring resources from his existing and future marital responsibilities. The alternative was that the child became a charge on the community. The problem was not fornication but its consequence - the bastard challenged the existing patterns of inheritance, the kinship network, and social discipline through the family.

The same kind of argument can be used to explain the general characteristic that illegitimacy was most common among the lower ranks of society. There were fewer incentives the lower the rank of the person to refrain from fornication or to subsequently marry. This comparison does not apply to the higher ranks where their position was sufficiently secure for any incentives for chastity to be comparatively minor. It was probably the middling sort who had most to gain or lose, poised as they were between the two poles of society. If this argument is valid, it implies that an individual of low rank had little expectations of personal advantage from familial, kinship and wider ties. The lack of wealth meant that they could not perform the duties expected of them. It can, however,

be argued that this very lack made it even more important for lower class individuals to maintain relationships - at least if they expected to advance themselves. The difficulty with this functional argument is that it ignores the self-perpetuating nature of the toleration of fornication - the ease of subsequent remarriage and the lack of censure from peers in itself made these people more prone to bastardy. It is a 'chicken-and-egg' argument: toleration leads to bastardy, which leads to toleration.

It remains true, however, that there was probably a close connection between property and sexual morality. Smout's conclusion for nineteenth century Scotland is possibly equally applicable to the sixteenth and seventeenth centuries: the foundation for the prevailing morality was the fact that marriage was, as well as a sexual contract, a contract by which property was transferred.<sup>1</sup> The significance of property is only partly because it was the primary means of production. It was also the physical object which marked different social relationships: it gave status, prestige and power, and it was used to transfer these between generations and within and outside the kinship group; it was a means of exerting parental authority and the reason for parental control over marriage. Property also symbolised the relationships within the household group as it was exploited primarily by the household. To say that property was the basis for attitudes to sex is to state that such attitudes were dependent on the social links of society and not on theological presuppositions.

---

1 Smout. 'Aspects of sexual behaviour'; 78

## 10. CONCLUSION.

The sources used in this thesis suffer from the same defects as any other historical evidence, and the fact of their publication in edited versions can create a misleading impression of completeness and finality. The 'Book of the Universal Kirk' is, for instance, a derived work based primarily on an early seventeenth century abridgement of the original registers which are now lost. The fire in the House of Commons in 1834 destroyed two volumes, covering the General Assemblies of 1590 to 1616, and a well-authenticated duplicate of the registers for 1560 to 1590 known as the 'great volume'. The latter contained a much larger amount of material - perhaps treble - than that surviving. Thus some of the apparent inconsistencies and contradictions in the Church's attitudes may be a reflection of this loss. The 'Acts of Parliament' and the 'Registers of the Privy Council' are much less defective though some of the Privy Council material is missing too, even at such a late period as the 1680's. The Privy Council documents in their published form can obscure the fact that they are essentially a collection of loose and miscellaneous documents bound together in chronological order. It is fortunate that the publishing and editing of the records used is to a high standard, particularly those published by the nineteenth century historical clubs like the Bannatyne, Maitland and Spalding. Equally fortunate is the lack of prudery shown by the editors: most do not omit 'vulgar or coarse material'. In contrast some of the subsidiary sources, particularly the kirk session material, is heavily edited and consists largely of 'acts' rather than individual cases.

A problem which is common to most of the sources is the lack of information on why a particular action was taken - the evidence records enactments rather than the justification for such acts. An exception is

the preambles to the Acts of Parliament but these are more usually an exercise in propaganda rather than a reasoned explanation. Particularly common is the excuse that the Act is only reaffirming existing legislation when the Act is actually innovatory, and the excuse that an abuse is widespread when this cannot be substantiated from other records.

It should also be emphasised that only a small part of the surviving material, both published and unpublished has been examined. For instance, reference has not been made to the important collections of documents made by Spottiswood, Wodrow, Row and Calderwood. The thesis has concentrated on the material which gives the decisions made by central government with the quoting of local enactments restricted to a very few sources which may be unrepresentative. For instance reference has not been made to a large number of unpublished kirk session, presbytery and synod registers. Similarly most of the material provides evidence on what should have happened rather than what did - the law rather than actual behaviour. This is not due to a lack of original sources: many volumes of cases from church, commissary and criminal courts still survive and are readily accessible in the Scottish Record Office. Hopefully this thesis will provide the necessary background for someone to undertake detailed and localised studies of sexual irregularities based on some of this other evidence.

These difficulties, however, are not the only problems in interpreting the sources. This thesis deals with attitudes as expressed in legislation which normally defines what is wrong behaviour and declares the penalties for offences. But legislation reveals more than this, particularly in its method of application. It is an artifact of the institutions which created it and is subject to the same pressures and bargaining as more overt political forms of behaviour.

A law represents the success of a particular group in winning and exercising power, though that group may be motivated by principles and not just expediency. The Acts of Parliament discussed in this thesis illustrate the various uses made of law. The Act of 1563 anent notour adultery, for instance, shows the law as principally declaratory, as there is good reason to believe that the strict enforcement of its penalties was not intended. It represents a compromise between those who regarded adultery as less serious than those who demanded the death penalty for all forms. Similarly the inclusion of the condition in the Act of 1600 that marriage to your paramour was forbidden only when she was named in your decree or divorce appears to have been a deliberate loophole. There was usually no Act of Parliament where there was no conflict of views. Sodomy and bestiality were not statutory offences, probably because there was a consensus that offenders should be capitally punished. Some Acts were diverted from their original purpose to suppress other forms of deviancy. For instance the Restoration Acts against Irregular or Clandestine Marriage were increasingly directed towards the suppression of religious non-conformity. With some Acts the claim is made that they are merely ratifying existing laws, though they may have fallen into disuse. The Act of 1567 anent fornication, for example, was ratified on several occasions in the late seventeenth century by general Acts against prophaneness, yet by that time the penalties in the original Act were probably no longer exacted.

Despite these difficulties, Acts of Parliament and acts of the General Assembly reveal what some people thought of some forms of behaviour. The problem is who these people were, and how

representative of the rest of society were their attitudes. It is not sufficient to evade the issue by saying that these are the attitudes of Parliament, Privy Council or the Church. Each of these institutions experienced changes in personnel and leadership, structure, and political-religious outlook. The General Assembly in the sixteenth century, for instance, was led by the early Reformers for the first ten years, dominated initially by members from Fife (especially St. Andrews) and from the Lothians (especially Edinburgh), and later by Melville and his followers. It was not until after 1590 that there was any large representation from north of the Tay. A particularly important feature was the presence of laity as well as clergy in the General Assemblies, presbyteries until the Restoration, and in kirk sessions. The Church's attitude was not solely that of ministers. But it is not possible to discuss the social composition and leadership of the Church in detail because the basic research has not been done. This is partly a reflection of inadequate sources though some analysis could be made of the important committees of the early Assemblies, and of elders in kirk sessions. Little is known about the social origins of ministers. Some changes have, however, been suggested. After the Reformation it is said that few ministers were related to the nobility, and that in the 1560's stipends were too low to make the Church an attractive career to men of middling origin. The financial position of the clergy, however, improved from the 1570's until in the seventeenth century a clerical career appealed to the younger sons of lairds as ministers were often better off than smaller lairds. Many ministers were themselves sons of the manse. Donaldson concludes that in the seventeenth century "both the episcopate and the ministry generally were recruited from the families of landed gentry".<sup>1</sup>

1 Donaldson. 'Scotland'; 151.

See also: Cowan. 'Church and Society'; 186, 191.



The 'Church' referred to in this thesis was not set apart from the rest of society: both the lay office holders and the ministry were from the landed, middling ranks of society and shared the same worries. The ability of ministers to lawfully marry meant that they were personally concerned in the problems of inheritance, adultery and the future of their children. Connell has argued that the attitude to marriage of Irish clergy in the nineteenth century "was that of the peasant society from which he sprang: that same society explains much of the quaintness and boisterousness of his teaching".<sup>1</sup> A similar statement could be made for the Church of Scotland with the qualifications that the ministry came from a level above peasant farmers and that the influence of their social origin was reinforced by clerical marriage.

Parliament and Privy Council were not as representative as the General Assembly because the government exerted influence on the selection of their members. Changes in the Parliamentary franchise were less important than changes of government. It was only in the 1640's, and to a lesser extent after 1690, that members of Parliament had much influence on legislation: at other times the Committee of Articles controlled which proposals were debated and Parliament could do little other than voice its opposition to specific measures. However, Parliament was not a mere rubber stamp for proposed legislation and on at least one occasion changes were made (the Parliamentary commission on rapt of 1609). The Privy Council was less representative than Parliament as its members were appointed by the Crown but more important as it was the basic institution of government, performing both executive and legislative functions.

1 Connell, 'Catholicism and Marriage'; 126: see also 123, 152, 155.

The way the government and the Church interacted to produce specific measures also has an important bearing on whose attitudes these measures can be said to represent. In general Acts of Parliament were passed at the petition of the Church when it was bargaining from a position of strength. This usually occurred<sup>f</sup> when the government needed the support of the Church - for instance in 1567 when the Church was wooed by both Mary and those who forced her to abdicate, and in the 1690's when William 'usurped' the throne. Occasionally the government was more closely allied ideologically to the Church, as in 1560 and 1649. The Church's success in obtaining legislation rested on its willingness to haggle and compromise, and on its ability to win political allies, whether they were fervent believers or fellow travellers. The reluctance of the government on most occasions to pass legislation does not, however, imply that their moral attitudes were different to those of the Church - for example, both would agree that it was wrong to commit adultery or incest. The disagreements appear to have been rather over the means and the necessity for civil penalties. For instance adultery was seen by most as wrong, but not all agreed that adulterers should be punished by death or that divorced adulterers should not remarry. It is possible that this unwillingness to support the Church with civil legislation reflected the belief that moral matters were proper to the religious courts and its penalties, and were not proper to the criminal courts.

It is not possible to define whose attitudes have been discussed in this thesis. Recourse has to be made to imprecise and general statements. Most of the Church material represents the views of both the laity and the clergy; they were people who owned and disposed of property and were predominantly from the middle ranks of society, though

the leadership of the nobility was often decisive, eg. Argyll in 1648-9. The institutions of government were dominated by the nobility. The circumstances under which specific laws were passed strongly suggest that the moral activists were a minority. This does not imply 'a priori' that their attitudes were not shared by most propertied people, nor by those without property. The thesis has not dealt with material which would show whether the lower ranks of society were amoral or had a different code of morals. The willingness of most offenders to undergo penance suggests that most people at least accepted that the Church had the right to impose a code of morality. The frequency of offences does not necessarily imply a rejection of the official moral code, and in only a few cases does the offender argue that his alleged actions were not immoral. Most people probably accepted the official moral code as a guide to what was right and wrong but this did not make them paragons of virtue and many preferred the 'forbidden pleasures'. The Church and the State reserved the most severe penalties for the persistent and obstinate offender who refused to accept their guilt or change their behaviour. The papist, the notour adulterer, and the trilapse fornicator risked death or at least a long period of moral re-education on the stool of penance. The acts of the General Assembly and the Acts of Parliament reveal the attitudes of people with property to marriage and sex but do not show behaviour or the extent to which individuals adopted this value system as their own.

It is possible to be more precise about the origins of this moral code. The first is the medieval canon law. The Reformers worked within a system of law which had been developed over hundreds of years. They sought to change parts of it and did not reject all of it. Canon Law had been taught in Scottish universities, for instance, the 'Lectures' by William Hay, and remained part of Scots law. This continuity is symbolised in the careers of individuals. For example,

Sir James Balfour was the Official of Lothian for six years and later became the chief commissary of Edinburgh after the Reformation. In his 'Practicks' he retained the pre-Reformation legislation relating to the Church, except for those parts affected by the abolition of the mass and papal jurisdiction, and apparently applied it to the reformed Church.<sup>1</sup> Canon law was still influential in the seventeenth century. MacKenzie described its authority and status in the 1680's in the following terms:

"though it was compiled by several private men at the command of Popes, and so has here no positive Authority since the Reformation; yet our Ecclesiastick Rights were settled before the Reformation. And because many things in that law were founded upon Justice and Equity, and exactly calculated for all Churchmen therefore that Law is yet much respected amongst us, especially in what relates to Conscience and Church Affairs".<sup>2</sup>

Perhaps the most important principle adopted from Canon Law (which partly derived it from Roman Law) was that the essence of marriage was the exchange of mutual consent in words of the present time between a couple who were lawfully capable of contracting marriage. The Reformers also retained the Canon Law's provisions on separation from bed and board. The impediments of 'bad faith' and 'wife-murder' probably influenced the debate on the remarriage of adulterers. The concepts of recrimination and the right of the innocent party to sue in separations 'a mensa et thoro' were applied also to divorce 'a vinculo'.

The Canon Law and the Reformers' moral code both relied for their legitimacy and validity on the claim that they were divine law as revealed in the Bible. Their differences were partly the result of the Reformers' rejection of Papal claims in preference to scriptural

1 Balfour. 'Practicks'; xliv.

2 MacKenzie. 'Account of the Law'; 71.

fundamentalism, and their greater emphasis on Old Testament law codes and Pauline teaching. The Reformers accepted as contemporary law the books of Leviticus and Deuteronomy: for instance, the General Assembly repeatedly urged Parliament to pass an Act punishing all forms of adultery by death. The basic attitudes of the Church of Scotland in the sixteenth and seventeenth centuries were the same as in the nineteenth century as summarised by Boyd. These theological presuppositions were

"1. According to God's Word: monogamous marriage was ordained by God for the mutual help and comfort of husband and wife, for the increase of mankind and of the church, and for the prevention of uncleanness; the legal basis of marriage should be consent, provided the parties are not related within the forbidden degrees; and divorce and re-marriage of the innocent party should be allowed on the ground of adultery or wilful desertion.

"2. God requires all men and women to be chaste in heart, speech and behaviour.

"3. God requires all men and women to preserve the honours and duties of their places and relations as superiors, inferiors or equals in the family and society." 1

This continuity was possible because of a lack of definition which enabled the same words to be given different interpretations. In theory divine law was absolute and unchanging, but in practice Hebrew law, produced within a very different kind of society, was applied to Scottish society by compromise, ignoring certain parts of the Bible, biased interpretation and very convoluted exegesis. There were ways to get around the literal interpretation. For instance, the Hebrew law relating to the deflowering of virgins was

1 Boyd. 'Theological Presuppositions'; 570-571.

ignored after a few years. The death penalty for all adulterers and the prohibition on the remarriage of adulterers were eventually dropped as part of the Church's moral code. Divorce 'a vinculo' on the grounds of adultery was adopted despite the lack of definitive scriptural authority, and divorce 'a vinculo' for desertion was accepted without much opposition or scriptural basis. The application of the Biblical moral code was impossible without such compromises.

The third source for the moral code was the structure of society, and it was this which forced the Church to compromise. The moral code was altered to fit society, rather than the structure of society changing to fit Hebrew laws. There is insufficient evidence on Scottish social structure to demonstrate this in detail as there are no detailed studies of local communities in the sixteenth and seventeenth centuries. On the most general level there were two main features. The first was the importance of property, especially land, which was held and exploited on an individual or family basis. Agriculture formed the economic basis of pre-industrial society, and the majority of people derived their living from either working directly on the land or from the revenue it produced. Other sources of wealth - trade, iron, coal, salt-pans, fishing, etc. - were less important and often supplementary or seasonal sources of livelihood. Land represented the most permanent form of wealth - the fishing might fail because of changes in the pattern of herring migration, and merchant ships might be lost at sea. The economic importance of land was reinforced by the social obligations associated with it. The tenant was obligated to his landlord, and owed more than merely cash or produce. The feudal element still persisted with landowners acting as the protectors and war-leaders of their tenants, though this was relatively unimportant in the Lowlands after 1650 and was replaced by non-military paternalism.

The second main factor was the way property, and hence wealth and livelihood, was transferred between generations. The system of inheritance required the undisputed paternity of children and thus female monogamy. The attitudes to fornication are ultimately derived from this requirement. The harsh attitude towards adultery by married women and the demand for the public celebration of marriage were attempts to ensure that paternity could not be disputed. Male polygamy was regarded more tolerantly - eg. the keeping of mistresses - unless it jeopardised the interests of the 'rightful heirs'. The ritual purification codes of Hebrew law in the Old Testament were used to support the system of inheritance. Hebrew polygamy was relegated to theological disputes and extreme secretarians like the Anabaptists of Munster. The courts of the Church played a particularly important role in supporting the system of inheritance. James' comment on the sixteenth and seventeenth century Bishop's courts of Durham can be equally applied to kirk sessions and presbyteries - "in these courts a kind of generally approved social morality was enforced, aiming particularly at ensuring the stability of the patriarchal family and monogamous marriage, on which depended the orderly transmission of values, skills, and property from one generation to the next".<sup>1</sup>

The interaction of these three factors - Canon Law, the Reformers' ideology, and the structure of society - created the moral code which formed the basis for the enactments of Parliament and the General Assembly. The importance of paternity in inheritance and of land in society were both structural features common to other Western European countries. Hajnal has suggested that there was a Western European marriage pattern and in the second chapter of this thesis it was hypothesised that there

1 James. 'Family, lineage and society'; 53.

was also a common household system which through the adoption of different solutions to demographic crises could lead to different patterns of co-residence. Western Europe also shared the tradition of the medieval Canon Law, though the extent to which it was applied as local law varied. Protestant theology was shared by a large number of countries - England, New England, Denmark, for instance - while the Catholic countries retained the traditional theology as revised by the Council of Trent. It is plausible that there can be deduced a Western European system of marital and sexual attitudes at the level of enactments by state authorities, and that there were two subsystems according to whether the established Church was Catholic or Protestant. This is not to say the laws will be the same - adultery may be held as reprehensible in all countries without it being a capital offence. Nor does it mean that the 'official' attitudes will be universal within a society, or that they will be rigorously enforced.

The basic attitudes were:

1. homosexuality and bestiality were the most reprehensible forms of sexual deviance.
2. incest within the immediate family - parents, children, and siblings - was the next most reprehensible. The extent to which other incestuous relationships were condemned was more variable, though uncle/niece or aunt/nephew were normally regarded as abhorrent. Sex or marriage between first cousins was regarded as lawful in Scotland. Although officially no distinction was made between affines or consanguines, or relationships based only on intercourse, it is possible that these were regarded as less serious than some forms of adultery. The incest taboo is based in part on the potential disruption to the role obligations of the partners, particularly when they were of different generations.



3. adultery was regarded as a serious form of sexual deviancy which threatened to deny the lawful heirs their rights of inheritance. The adultery of a married woman was regarded as the worst form, and the adultery of a married man with a single woman was regarded as no worse than some forms of fornication.

4. attitudes to the different forms of sexual relationships between the unmarried was largely dependent on how the bastard was maintained, although 'officially' all forms of fornication were equally reprehensible. Cases where the parents subsequently married after conception were regarded lightly as the child was brought within the normal framework of family life.

The obvious offence omitted from this list is rape. The evidence from Scotland suggests that this was regarded primarily as violent assault and not as a specifically sexual offence. The attitudes to sex were based largely on the potential disruption of rights of inheritance, maintenance of children by their parents, and on kinship relationships. Officially sex was proper only between married partners.

The basic marital attitudes were:

1. marriage was monogamous and life-long. Scotland was unusual in permitting divorce 'a vinculo' <sup>by an action through the regular courts</sup> and even then the ideal was still maintained that marriage was until death.
2. marriage was a public event which should be celebrated before the whole community.
3. children should have the consent of their parents, or those 'in loco parentis', to their marriage. This could vary from marriages arranged by parents without consideration being given to the personal wishes of their children to marriages where the child made the selection of marriage partner and the parents were expected to accede to their choice.
4. the legal and theological validity of the marriage was founded on the free exchange of mutual consent in words of the present time

between a couple lawfully capable of contracting marriage.

The solemnisation of marriage was the giving of God's blessing to the union, and its absence did not affect the validity of a marriage.

The last three points safeguarded the interests in marriage of the community, the family and the individual. The balance struck between these three factors varied both between societies and within societies. In pre-industrial societies in Western Europe the scales were weighted against the individual and in favour of supervision by the community and family. Status was ascribed by the community rather than achieved through individual merit, and it was the family which provided the foundation of wealth through inheritance and of support in the community. There were probably different patterns of behaviour for those who had property and status, and those who did not. It was the former who controlled the organs of government which they used to rationalise and enforce their own views as the 'official attitudes' of society.

---

## 11. BIBLIOGRAPHY.

### 11.1. Abbreviations.

AHR	American Historical Review
AJS	American Journal of Sociology
ASR	American Sociological Review
BJS	British Journal of Sociology
C St SH	Comparative Studies in Society and History
Dumfr Trans	Transactions of the Dumfriesshire and Galloway Natural History and Antiquarian Society
EHR	Economic History Review
JIH	Journal of Interdisciplinary History
JM&F	Journal of Marriage and the Family
NEQ	New England Quarterly
P&P	Past and Present
Pop St	Population Studies
PSA	Proceedings of the Society of Antiquaries of Scotland
RSCHS	Records of the Scottish Church History Society
SHR	Scottish History Review
SHS	Scottish History Society
SJT	Scottish Journal of Theology
SLT	Scots Law Times (News)
SRS	Scottish Record Society
SS	Scottish Studies
STS	Scottish Text Society
Vict St	Victorian Studies
W&MQ	William and Mary Quarterly

## 11.2. Contemporary Sources.

- 'Answer to the Satire' 'Answer to the Satire against Scotland'.  
Anon. In: 'Abbotsford Miscellany', I,  
305-317. (Edin. 1837)
- 'A.P.S.' 'The Acts of the Parliaments of Scotland'.  
Ed T.Thomson and C.Innes. 12 vols. (Edin.  
1814-1875)
- Arnot, H. 'Celebrated Crim.Trials': 'A collection  
and abridgement of celebrated Criminal  
Trials in Scotland from AD 1536 to 1784  
with historical and critical remarks'.  
(Edin. 1785).
- Balfour, Sir J. 'The Practicks of Sir James Balfour of  
Pittendreich'. Ed. P.G.B.McNeill. (Stair  
Soc. 1962-3).
- Boswell, J. 'Boswell's Journal of the Tour to the Hebrides  
with Samuel Johnson'. Ed. F.A.Pottle and  
C.H.Bennett. (London 1936).
- 'Bk.of Cn.Order' 'The Book of Common Order'. In: Knox 'Works',  
VI, 277-333.
- 'Bk.of Disc.' 'The [First] Book of Discipline'. In: Knox  
'Hist of Ref.' II, 280-325.
- Blakhall, G. 'Briefe Narration'. Ed. J.Stuart. (Spalding  
Club 1844)
- Brereton, Sir W. 'The Journal of Sir William Brereton, 1635.'  
In: 'North Country Diaries', II, 1-50. Ed.  
J.C.Hodgson. (Surtees Soc. 1914).

- 'B.U.K.'
- 'The Booke of the Universall Kirk of Scotland. (Acts and proceedings of the General Assemblies of the Kirk of Scotland, from the year 1560)'. Ed. T.Thomson. 3 vols. (Maitland & Bannatyne Clubs 1839, 1840, 1845).
- Eutler, D.
- 'The life and letters of Robert Leighton'. (London 1903).
- Brand, Rev.J.
- 'A brief description of Orkney, Zetland, Pightland-Firth, the Caithness, wherein, after a short journal of the Author's voyage thither, these Northern Places are first more generally described ...' (Reprint Edin. 1883).
- Brown, P.Hume (ed)
- 'Early Travellers in Scotland (1295-1689)' (Edin. 1891).
- Brown, P.Hume (ed)
- 'Scotland before 1700 from Contemporary Documents'. (Edin. 1893).
- Brown. P.Hume (ed)
- 'Tours in Scotland in 1677 and 1681'. (Edin. 1892).
- 'Burgh Recs. Abdn.'
- 'Extracts from the Council Register of the Burgh of Aberdeen'; II, 1570-1625. Ed. J. Stuart. (Spalding Club 1848).
- 'Burgh Recs. Edin.'
- 'Extracts from the Records of the Burgh of Edinburgh'. Ed. J.D.Marwick. 4 vols. (Edin. 1869, 1871, 1875, 1882).
- 'Burgh Recs. Peebles'
- 'Extracts from the Records of the Burgh of Peebles 1652-1714.' Ed. R.Renwick. (Sc. Burgh Recs. Soc. 1910).

- 'Burgh Recs. Stirling' 'Extracts from the Records of the Royal Burgh of Stirling'. Ed. R.Renwick. 2 vols (Glasgow 1887, 1889).
- Calderwood, D. (ed) 'The First and Second Booke of Discipline together with some Acts of the Generall Assemblies and confirming the same: And an Act of Parliament'. (Leyden 1621).
- 'Catechism' 'The Catechism of John Hamilton, Archbishop of St. Andrews, 1552'. Ed. T.G.Law. (Oxford 1884).
- Chambers, R. 'Domestic Annals of Scotland'. 2 vols. (Edin. 1858-1859).
- 'Concilia Scotiae' 'Concilia Scotiae: Ecclesiae Scoticae Statuta tam Provincialia Quam Synodalia quae supersunt'. Ed. J.Robertson. 2 vols. (Bannatyne Club 1866).
- Craig, Sir T. 'Jus Feudale'. Trans J.A.Clyde. 2 vols. (Edin. 1934).
- Defoe, D. 'A Tour thro' the whole Island of Great Britain, Divided into Circuits or Journeys ...'. Ed. G.D.H.Cole, vol II, 689-841. (London 1927).
- 'Directory' 'The Directory for the Public Worship of God throughout the three Kingdoms' (1645). Reprinted in: 'The Book of Common Order and The Directory' ed. G.W.Sprott and T.Leishman. (Edin. 1868).

- Dirleton, Lord                    'Some doubts and questions in the law,  
especially of Scotland; as also, some  
decisions of the Lords of Council and  
Session'. (Edin. 1698). (Aldis 3767A).
- 'Ecc. Recs. Abdn.'                'Selections from the records of the Kirk  
Session, Presbytery, and Synod of  
Aberdeen'. (Spalding Club 1846).
- 'Fergusson's Scottish  
Proverbs'                        'Fergusson's Scottish Proverbs from the  
original print of 1641 together with a  
larger manuscript collection'. Ed.  
E.Beveridge. (STS 1924).
- Firth, C.H. (ed)                  'Scotland and the Commonwealth, 1651-1653'.  
(SHS 1895).
- Firth, C.H. (ed)                  'Scotland and the Protectorate, 1654-1659'.  
(SHS 1899).
- First, C.H. and Rait,  
R.S. (eds)                        'Acts and Ordinances of the Interregnum:  
1642-1660'. 3 vols. (London 1911).
- Forbes, W.                        'The duty and powers of Justices of Peace  
in this part of Great Britian called  
Scotland'. (Edin. 1707).
- 'G.A.Acts'                        'Acts of the General Assembly of the Church  
of Scotland, 1638-1842'. Ed. T.Pitcairn et  
al. (Edin. 1843).
- 'G.A.Commissions'                'The records of the Commissions of the  
General Assemblies, 1646-1653'. Ed. A.F.  
Mitchell and J.Christie. 3 vols. (SHS 1892,  
1896, 1909).

- Gardiner, S.R. (ed) 'Charles II and Scotland': 'Letters and Papers illustrating the relations between Charles II and Scotland in 1650'. (SHS 1894).
- Gloucester, C.S. (ed) 'The first and second Prayer Books of King Edward the Sixth'. (London n.d.)
- Hair, P.E.H. 'Before the Bawdy Court: selections from church court and other records relating to the correction of moral offences in England, Scotland and New England, 1300-1800'. (London 1972)
- Hay, W. 'Lectures on Marriage'. Ed. J.C.Barry. (Stair Soc. 1967)
- Henderson, A. 'The Government and Order of the Church of Scotland'. (Edin. 1641) (Aldis 1006).
- Hermand, Lord 'Consistorial Decisions, 1684-1717'. Ed. F.P.Walton. (Stair Soc. 1940).
- Hope, Sir T. 'Major Practicks' 1608-1633. Ed. J.A.Clyde. 2 vols. (Stair Soc. 1937-1938)
- Hope, Sir T. 'Minor Practicks'. (Edin. 1726)
- 'CXI Propositions' 'CXI Propositions concerning the Ministerie and Government of the Church' by G.Gillespie. (Edin. 1647) (Aldis 1266)
- 'Just. Cases' 'Selected Justiciary Cases, 1624-1650'. Ed. S.A.Gillon and J.I.Smith. 2 vols. (Stair Soc. 1953, 1972).
- 'Just. Court' 'The records of the proceedings of the Justiciary Court of Edinburgh, 1661-1678'. Ed. W.G.Scott-Moncrieff. 2 vols. (SHS 1905)



- Kirk, T. 'A Modern Account of Scotland; being an exact Description ... by an English Gentleman'. In: Brown 'Early Travellers', 251-265.
- Kirk, T. 'Travel Diary'. In: Brown 'Tours in Scotland', 1-48.
- Knox, J. 'History of the Reformation in Scotland'. Ed. W.C.Dickinson. 2 vols. (Edin. 1949)
- Knox, J. 'The Works of ...'. Ed. D.Laing. 6 vols. (Edin. 1846-1864)
- 'K.S.Reg. Cambusnethan' 'Extracts from the Register of the Kirk Session of Cambusnethan, from April 1636 to September 1695'. In: 'Miscellany of the Maitland Club', I, 428-431. (Edin. 1834)
- 'K.S.Reg.Humbie' 'Extracts from the Register of the Kirk Session of Humbie from October 1644 to April 1655'. In: 'Miscellany of the Maitland Club', I, 432-444. (Edin. 1834)
- 'K.S.Reg.Perth' 'Extracts from the Kirk Session Register of Perth (1577-1634)'. In 'Spottiswood Miscellany', 211-311. (Edin. 1845)
- 'K.S.Reg.St.Ands (1)' 'The Register of the Minister, Elders and Deacons of the Christian Congregation of St.Andrews, 1559-1600'. Ed. D.H.Fleming. 2 vols. (SHS 1889-1900)
- 'K.S.Reg.St.Ands (2)' 'Extracts from the Kirk Session Register of St.Andrews, 1559-1563'. In: 'Miscellany of the Maitland Club', III, 207-336. (Edin. 1843)

- 'K.S.Reg.Stirling (1)' 'Extracts from the Registers of the Kirk Session of the Burgh of Stirling' (Nov 1597 to Dec 1600). In: 'Miscellany of the Maitland Club', I, 127-136. (Edin. 1834)
- 'K.S.Reg.Stirling (2)' 'Extracts from the Register of the Kirk Session of Stirling, from May 1601 to November 1649'. In: 'Miscellany of the Maitland Club'; I, 445-484. (Edin. 1834)
- Lamb, J.A. (ed) 'Ecclesiastical Rules and Constitutions for Order and Discipline'. In: 'R.S.C.H.C.'; 1966-1968, 151-177.
- Lamont, J. 'The Diary of Mr John Lamont of Newton, 1649-1671'. (Maitland Club 1830)
- 'Larger Catechism' 'The Larger Catechism agreed upon by the Assembly of Divines at Westminster'. In: 'The Confession of Faith; the Larger and Shorter Catechisms, etc'. (Edin. 1855)
- Laud, W. 'The Works of ...'. Ed. W.Scott and J.Bliss. 6 vols. (London 1847-1857)
- Lauder, Sir J. 'Journals of Sir John Lauder, Lord Fountainhall, with his observations on public affairs and other memoranda, 1665-1676'. Ed. D.Crawford. (SHS 1900)
- 'Lauderdale Papers' 'The Lauderdale Papers'. Ed. O.Airy. 3 vols. (Camden Soc. 1884-1885)
- 'Liber Officialis' 'Liber Officialis Sancti Andree'. Ed. C.Innes. (Abbotsford Club 1845)
- Lowther, C. 'Our Journal into Scotland'. In: Hist.Mss. Comm, Report Mss of the Earl of Lonsdale, Appendix, Part VII, 75-88. (HMSO 1893)

- 'Macf Geog Coll' 'Macfarlane's Geographical Collections'.  
Ed. Sir A.Mitchell and J.T.Clark. 3 vols.  
(SHS 1906-1908)
- Mackenzie, Sir G. 'An Account of the Law and Government of  
Scotland'. In: 'Macf Geog Coll', III, 70-82.
- Mackenzie, Sir G. 'The Laws and Customs of Scotland in Matters  
Criminal ...'. (Edin. 1678) (Aldis 2133c)
- Mackenzie, Sir G. 'Observations on the Acts of Parliament  
from 1424' (Edin. 1686) (Aldis 2645a)
- Melville, J. 'The Autobiography and Diary of James  
Melville'. Ed. R.Pitcairn. (Wodrow Club 1842)
- Morison, W.M. 'Dictionary': 'The Decisions of the Court  
of Session, from its first institution to  
the present time, digested under proper  
heads in the form of a dictionary'. 19 vols.  
(Edin. 1801-1804)
- Nicoll, J. 'A diary of public transactions'. Ed. D.  
Laing. (Bannatyne Club 1836)
- Pitcairn, R. (ed) 'Criminal Trials in Scotland from 1488 to  
1624'. (Edin. 1833)
- 'Prayer Book of 1637' In: 'The making of the Scottish Prayer Book  
of 1637'. Ed. G.Donaldson. (Edin. 1954)
- 'Prot.Bk.Carruthers' 'Protocol Book of Mark Carruthers, 1531-  
1561'. Ed. R.C.Reid. (S.R.S. 1956)
- 'Prot.Bk.Corbet' 'Protocol Book of Sir William Corbet, 1529-  
1555'. Ed. J.Anderson and W.Angus. (S.R.S.  
1911)
- 'Prot.Bk.Cristisone' 'Protocol Book of Sir John Cristisone, 1518-  
1551'. Ed. R.H.Lindsay. (S.R.S. 1928)

- 'Prot.Bk.Gaw' 'Protocol Book of Sir Alexander Gaw, 1540-1558'. Ed. J.Anderson. (S.R.S. 1910)
- 'Prot.Bk.Grote' 'Protocol Book of Gilbert Grote, 1552-1573'. Ed. W.Angus. (S.R.S. 1914)
- 'Prot.Bk.Johnsoun' 'Protocol Book of Dominus Thomas Johnsoun, 1528-1578'. Ed. J.Beveridge and J.Russell. (S.R.S. 1917, 1919, 1920)
- 'Prot.Bk.Rollok' 'Protocol Book of Sir Robert Rollok, 1534-1552'. Ed. W.Angus. (S.R.S. 1931)
- 'Prot.Bk.Thounis' 'Protocol Books of James Foulis, 1546-1553, and Nicol Thounis, 1559-1564'. Ed. J. Beveridge and J.Russell. (S.R.S. 1927)
- 'Prot. Bk.Young' 'Protocol Book of James Young, 1485-1515'. Ed. G.Donaldson. (S.R.S. 1941, 1952)
- Robinson, H. (ed) 'Original Letters relative to the English Reformation written during the reigns of King Henry VIII, King Edward VI, and Queen Mary: Chiefly from the Archives of Zurich'. (Parker Soc. 1846)
- 'R.P.C.' 'The Register of the Privy Council of Scotland'. Ed. J.H.Burton et al. 36 vols. 3 series. (Edin. 1877 -)
- 'R.P.Glasgow' 'Extracts from the Registers of the Presbytery of Glasgow from November 1603 to August 1626'. In: 'Miscellany of the Maitland Club', I, 401-427. (Edin. 1834)
- Sibbald, Sir R. 'The Memoirs of my life'. In: 'The Memoirs of Sir Robert Sibbald (1641-1722)'. Ed. F.P.Hett. (O.U.P. 1932)

- Sprott, G.W. (ed) 'Scottish Liturgies of the reign of James VI'. (Edin. 1871)
- Stair, Viscount 'The Institutions of the Law of Scotland'. (Edin. 1693) (Aldis 3296)
- 'Stats of the Realm' 'The Statutes of the Realm ... from original records, 1101-1713'. Ed. A.Luders, T.E.Tomlins et al. 11 vols. (London 1810-1828)
- 'Statutes' 'Statutes of the Scottish Church: 1225-1559, being a translation of 'Concilia Scotiae: Ecclesiae Scoticae Statuta tam Provincialia quam Synodalia quae supersunt'. Ed. D.Patrick. (S.H.S. 1907)
- Stewart, Sir J. 'Dirleton's doubts and questions in the law of Scotland resolved and answered'. (Edin. 1715)
- 'Synod of Fife' 'Selections from the Minutes of the Synod of Fife, 1611-1687. (Abbotsford Club 1837)
- Taylor, J. 'A Journey to Edinburgh in Scotland'. Ed. W.Cowan. (Edin. 1903)
- Thomas, Rev.T. 'A journey through Hertfordshire, Lincolnshire, and Notts to the Northern Counties and Scotland'. In: 'Hist.Mss.Comm, Report Mss Duke of Portland at Welbeck Abbey, VI, 81-147. (H.M.S.O. 1901)
- 'Trent Canons' 'The Canons and Decrees of the Council of Trent'. Trans. J.Waterworth. (London 1848)

- Weldon, Sir A.(?) 'A perfect description of the people and country of Scotland'. In: Brown 'Early Travellers', 96-103.
- Wright, T. (ed) 'Three Chapters of Letters relating to the Dissolution of the Monasteries'. (Camden Soc. 1843)
- 11.3. Scottish secondary material.
- Adamson, D. 'The Hearth Tax'. (Dumfr.Trans. 1970, 147-177)
- Aldis, H.G. 'A list of books printed in Scotland before 1700'. (Edin. 1970)
- Anon. 'Handfasting'. (Northern Notes & Queries 1890, 129-131)
- Anton, A.E. 'Parent and Child'. In: Paton 'Introduction', 116-124.
- Anton, A.G. 'Handfasting in Scotland'. (S.H.R. 1958, 89-102)
- Ashley, A. 'The Honourable Estate: a study of marriage and the law in Scotland'. (London 1950)
- Ashley, M. 'General Monck'. (London 1977)
- Barry, J. 'William Hay: a sixteenth century Scottish Theologian and Canonist'. (Innes Rev. 1951, 82-99)
- Bingham, M. 'Scotland under Mary Stuart: an account of everyday life'. (London 1971)
- Boyd, K. 'The Theological Presuppositions of Scottish Church Pronouncements on Sex, Marriage and the Family: 1850-1914'. (PhD Th Edin. 1973)

- Brackenbridge, R.D. 'The enforcement of Sunday observance in post-Reformation Scotland, 1689-1733'. (R.S.C.H.S. 1970, 33-45)
- Burleigh, J.H.S. 'The Scottish Reforming Councils 1549 to 1559'. (R.S.C.H.S. 1951-1953, 189-211)
- Burns, T. 'Lectures on Church Property'. (Edin. 1905)
- Campbell, A.H. 'The structure of Stair's Institutions (21st lecture on the David Murray Foundation in the University of Glasgow)'. (Glasgow 1954)
- Campbell, W.M. 'The Triumph of Presbyterianism'. (Edin. 1958)
- Carter, I. 'Marriage patterns and social sectors in Scotland before the 18th century'. (S.S. 1973, 51-60)
- Carter, J.K. 'Sunday Observance in Scotland: 1560-1606'. (PhD Th Edin. 1957)
- Cowan, I.B. 'Church and society in post-Reformation Scotland'. (R.S.C.H.S. 1969-1971, 185-201)
- Cowan, I.B. 'The development of the parochial system in medieval Scotland'. (S.H.R. 1961, 43-55)
- Cowan, I.B. 'A bibliography of the Book of Common Order and Psalm Book of the Church of Scotland: 1556-1644'. In: Papers of the Edinburgh Bibliographical Soc. 1913.
- Cramond, W. 'Illegitimacy in Banffshire'. (Banff 1888)
- Donaldson, G. 'The Church Courts'. In: Paton 'Introduction', 363-372.
- Donaldson, G. 'The making of the Scottish Prayer Book of 1637'. (Edin. 1954)

- Donaldson, G. 'Mary Queen of Scots'. (London 1974)
- Donaldson, G. 'The polity of the Scottish Church 1560-1600'. (R.S.C.H.S. 1953, 212-226)
- Donaldson, G. 'Scotland': 'Scotland in the reigns of James V to James VI'. (London 1965)
- Donaldson, G. 'Scotland: the shaping of a nation'. (Newton Abbot 1974)
- Donaldson, G. 'The Scottish Reformation'. (C.U.P. 1960)
- Donaldson, G. 'Scottish Kings'. (London 1967)
- Donaldson, G. and Morpeth, R.S. 'Who's Who in Scottish History'. (Bristol 1973)
- Dunlop, A.I. 'Polity of the Scottish Church 1600-1637'. (R.S.C.H.S. 1954-1956, 161-184)
- Dunlop, A.I. 'William Carstares and the Kirk by Law Established'. (The Chalmers Lectures 1964) (Edin. 1967)
- Emmerson, G.S. 'A social history of Scottish Dance: and celestial recreation'. (McGill-Queen's U.P. 1972)
- Ferguson, W. 'Scotland 1689 to the Present'. (Edin. 1968)
- Foster, W.R. 'Bishop and Presbytery: the Church of Scotland 1661 to 1688'. (London 1958)
- Foster, W.R. 'Ecclesiastical Administration in Scotland: 1600-1638'. (PhD Th Edin. 1963)
- Fraser, Lord P. 'Treatise on Husband and Wife according to the Law of Scotland'. 2 vols. (Edin. 1876-1878)
- Gillon, R.M. 'John Davidson of Prestonpans: Reformer, Preacher and Poet in the generation after Knox'. (London 1936)



- Goldie, F. 'Short History of the Episcopal Church in Scotland'. (London 1951)
- Graham, R.R. 'Ecclesiastical Discipline in the Church of Scotland: 1690-1730'. (PhD Th Glasgow 1964)
- Grant, F.J. 'Presbyterian Court Records 1560-1935'. In: 'Sources and Literature of Scots Law'; 154-162. (Stair Soc. 1935)
- Gray, M. 'North-East Agriculture and the Labour Force, 1790-1875'. In: McLaren 'Social Class', 86-104.
- Green, R.E. 'The Commission of the General Assembly of the Church of Scotland 1690-1735'. (PhD Th Glasgow 1969)
- Greenshields, J.B. 'Annals of the Parish of Lesmahagow'. (Edin. 1864)
- Guthrie, C.J. 'The history of divorce in Scotland'. (S.H.R. 1911, 39-52)
- Halliday, J.M. 'A lawyer looks at Stair'. (S.L.T. 1966, 1-5)
- Haws, C.H. 'The diocese of Aberdeen and the Reformation'. (Innes Rev. 1971, 72-84)
- Henderson, G.D. 'Religious life in 17th century Scotland'. (Cambridge 1937)
- Henderson, G.D. 'The Scottish Ruling Elder'. (London 1935)
- Imrie, J. 'Justiciary Records: review of vol.I of selected Justiciary cases, 1624-1650'. (S.H.R. 1956, 83-86)

- Iredell, G.W. 'The law, custom and practice of the Parliament of Scotland with particular reference to the period 1660-1707'. (PhD Th London 1966)
- Ireland, R.D. 'Divorce': 'Husband and Wife: divorce, nullity of marriage and separation'. In: Paton 'Introduction', 90-98.
- Ireland, R.D. 'Husband and Wife: a) post-Reformation canon law of marriage of the commissaries' courts; and, b) modern common and statute law'. In: Paton 'Introduction', 82-89.
- Kermack, W.R. 'Did the marriage age of Scottish brides decrease in the 18th century?'. (Scottish Genealogist June 1971, 21-22)
- Kilpatrick, J. 'James Guthrie, minister at Stirling, 1649-1661'. (R.S.C.H.S. 1952, 176-188)
- Kyd, J.G. (ed) 'Scottish Population Statistics: including Webster's Analysis of Population 1755'. (S.H.S. 1952)
- Lamb, J.A. 'Archbishop Alexander Burnet, 1614-1684'. (R.S.C.H.S. 1952, 133-148)
- Lang, A. 'Sir George Mackenzie, King's Advocate, of Rosehaugh: his life and times'. (London 1909)
- M'Crie 'Life of Andrew Melville'. (Edin. 1899)
- McEwen, J.S. 'The faith of John Knox'. (Croall Lectures for 1960) (London 1961)
- McFarland, H.S. 'The Book of Discipline'. (Abdn. University Rev. 1960, 246-248)

- McKay, D. 'The duties of the medieval parish clerk'.  
(Innes Rev. 1968, 32-39)
- Mackerrall, A. 'Kintyre in the 17th century'. (Edin. 1948)
- Mackie, J.D. and Pryde, G.S. 'The estate of the burgesses in the Scots  
Parliament and its relation to the Conven-  
tion of Royal Burghs'. (St.Ands U.P. 1923)
- McLaren, A.A. (ed) 'Social class in Scotland: Past and Present'.  
(Edin. 1976)
- MacLean, D. 'Catholicism in the Highlands and Isles  
1560-1680'. (Innes Rev. 1952, 5-13)
- McMahon, G.I. 'The Scottish courts of high commission,  
1610-1638'. (R.S.C.H.S. 1966, 193-209)
- McMillan, W. 'The worship of the Scottish Reformed Church,  
1550-1638'. (The Hastie Lectures in the  
Univ. of Glasgow 1930) (London n.d.)
- McNeill, P.G.B. 'The jurisdiction of the Scottish Privy  
Council 1532-1708'. (PhD Th Glasgow 1960)
- McNeill, P.G.B. 'The legal aspect of the Scottish  
Reformation'. (S.L.T. 1962, 84)
- Marshall, R.K. 'The days of Duchess Anne: Life in the  
household of the Duchess of Hamilton 1656-  
1716'. (Glasgow 1973)
- Marshall, R.K. 'Mary of Guise'. (London 1977)
- Mathew, D. 'Scotland under Charles I'. (London 1955)
- Maxwell, T. 'William III and the Scots Presbyterians'.  
(R.S.C.H.S. 1965, 117-140 and 193-209)
- Mechie, S. 'Episcopacy in Post-Reformation Scotland'.  
(S.J.T. 1955, 26-35)

- Mitchell, A. 'List of travellers and tours, etc., relating to Scotland'. (P.S.A. 1901, 1905, 1910)
- Mitchell, A. and Cash, C.G. 'A contribution to the bibliography of Scottish topography'. 2 vols. (S.H.S. 1917)
- Mitchell, J.F. 'Hearth tax and Poll tax'. (Scottish Genealogist 1964, 8-12)
- Morton, R.S. 'Some aspects of the early history of Syphilis in Scotland'. (British Jrm. of Venereal Diseases 1962, 175-180)
- Murray, A. 'The marriage of the Earl of Sutherland 1567'. (S.H.R. 1972, 237-241)
- Murray, J. 'Kilmacolm: a parish history 1100-1898'. (Paisley 1898)
- Paton, G.C. 'Husband and Wife: Property Rights and Relationships'. In: Paton 'Introduction', 99-115.
- Paton, G.C. (ed) 'An introduction to Scottish Legal History'. (Stair Soc. 1958)
- Paul, J.B. 'The Post-Reformation Elder'. (S.H.R. 1912, 253-262)
- Ponsonby, A. 'Scottish and Irish diaries, from the sixteenth to the nineteenth century'. (London 1927)
- Plant, M. 'The domestic life of Scotland in the 18th century'. (Edin. 1952)
- Prevost, W.A. 'The Commissioners of Supply for Dumfriesshire 1692-1711'. (Dumfr. Trans. 1957-1958, 27-51)
- Rait, R. 'The Parliaments of Scotland'. (Glasgow 1924)

- Rehfishch, F. 'Marriage and the elementary family among the Scottish Tinkers'. (S.S. 1961, 121-148)
- Riddell, J. 'Peerage Law': 'Inquiry into the Law and Practice in Scottish Peerages before, and after the Union, together with an exposition of our genuine, original Consistorial Law'. 2 vols. (Edin. 1842)
- Rodger, W. 'The Poll Tax Rolls 1695'. (Scottish Genealogist 1964, 4-5)
- Rubenstein, H.L. 'Captain Luckless: James, First Duke of Hamilton 1606-1649'. (Edin 1975)
- Scanlan, J.D. 'Pre-Reformation Canon Law': 'Husband and Wife: Pre-Reformation Canon Law of Marriage of the Officials' Courts'. In: Paton. 'Introduction', 69-81.
- Seton, B. 'The distaff side: a study in matrimonial adventures in the 15th and 16th centuries'. (S.H.R. 1920, 272-286)
- Shaw, D. 'The General Assemblies of the Church of Scotland 1560-1600'. (Edin. 1964)
- Shaw, D. (ed) 'Reformation and Revolution: essays presented to Hugh Watt'. (Edin. 1967)
- Smith, D.B. 'An early case of collusion in divorce'. (S.L.T. 1962, 99-100)
- Smith, D.B. 'Legal Catechisms'. (S.L.T. 1962, 21-22)
- Smith, D.B. 'The Reformers and Divorce: a study on Consistorial Jurisdiction'. (S.H.R. 1912, 10-36)

- Smout, T.C. 'Aspects of sexual behaviour in 19th century Scotland'. In: MacLaren 'Social Class', 55-85.
- Smout, T.C. 'A history of the Scottish People 1560-1830'. (London 1969)
- Snow, W.G. 'The times, life and thought of Patrick Forbes'. (London 1952)
- Stephen, T. 'The life and times of Archbishop Sharp'. (London 1839)
- Stevenson, D. 'The Covenanters and the Government of Scotland: 1637-1651'. 2 vols. (PhD Th Glasgow 1970)
- Stevenson, D. 'The Scottish revolution, 1637-1644: the triumph of the Covenanters'. (Newton Abbot 1973)
- Terry, C.S. 'The Scottish Parliament: its Constitution and Procedure, 1603-1707'. (Glasgow 1905)
- Thomson, J.M. 'The Public Records of Scotland'. (Glasgow 1922)
- Walker, J. 'The Justice Court: review of 'Selected Justiciary Cases, 1624-1650'.'. (S.H.R. 1955, 53-58)
- Walton, K. 'Population changes in North East Scotland, 1696-1951'. (S.S. 1961, 149-180)
- Ward, W.R. 'The Land Tax in Scotland, 1707-1798'. (Bulletin of John Rylands Library 1954, 208-388)
- Warrack, J. 'Domestic life in Scotland 1488-1688. A sketch of the development of furniture and household usage'. (London 1920)

- Warrick, J. 'The Moderators of the Church of Scotland 1690-1740'. (Edin. 1913)
- Willock, I.D. 'Ecclesiastical courts and procedure'. (S.L.T. 1960, 17-20)
- Wood, M. 'Edinburgh Poll Tax Returns'. (The Book of the Old Edinburgh Club, 1945, 90-126)
- Youngson, A.J. 'After the Forty-Five'. (Edin. U.P. 1973)
- Youngson, A.J. 'Alexander Webster and his 'Account of the Number of People in Scotland in the Year 1755''. (Pop.St. 1961, 198-200)

#### 11.4. Comparative and sociological secondary material.

- Albrecht, M.C. 'Does literature reflect common values?' (A.S.R. 1956, 722-729)
- Anderson, M. (ed) 'Sociology of the family'. (London 1971)
- Arensberg, C.M. and Kimball, S.T. 'Family and Community in Ireland'. (2nd ed Harvard U.P. 1968)
- Aries, P. 'Centuries of Childhood: a social history of family life under the ancien regime'. Trans. R.Baldick. (New York 1962)
- Beattie, J.M. 'The pattern of crime in England 1660-1800'. (P&P 1974, 47-95)
- Becker, H.S. 'Outsiders'. (London 1963)
- Bell, N.W. and Vogel, E.F. 'A modern introduction to The Family'. (Free Press of Glencoe 1963)
- Berkner, L.K. 'Inheritance, land tenure and peasant family structure: a German regional comparison'. In: Goody 'Family and Inheritance', 71-95.

- Berkner, L.K. 'The Stem Family and the Developmental Cycle of the Peasant Household: An Eighteenth-Century Austrian Example'. (A.H.R. 1972, 398-418)
- Blythe, R. 'Akenfield, portrait of an English village'. (London 1969)
- Bingham, C. '17th century attitudes towards deviant sex'. (J.I.H. 1971, 447-468)
- Bissell, L.A. 'From One Generation to Another: mobility in 17th century Windsor, Connecticut'. (W&M.Q. 1974, 79-110)
- Bloch, I. 'Sexual life in England Past and Present'. Trans. W.H.Forstern. (London 1938)
- Chamblis, W.J. 'A sociological analysis of the law of vagrancy'. In: Carson, W.G. and Wiles, P. (eds) 'Crime and Delinquency in Britain', 206-219. (London 1971)
- Chappell, D. et al 'Forcible Rape: a comparative study of offences known to the police in Boston and Los Angeles'. In: Henslin 'Studies in the Sociology of Sex', 169-190.
- Christensen, H.T. 'Cultural relativism and premarital sex norms'. (A.S.R. 1960, 31-39)
- Cohen, S. 'Mods, Rockers and the Rest: Community Reactions to Juvenile Delinquency'. In: Carson, W.G. and Wiles, P. (eds) 'Crime and Delinquency in Britain', 226-236. (London 1971)
- Cohn, N. 'The Pursuit of the Millenium'. (London 1962)



- Coleman, E.R. 'Medieval marriage characteristics: a neglected factor in the history of medieval serfdom'. (J.I.H. 1971, 205-219)
- Cominos, P.T. 'Late-Victorian sexual respectability and the social system'. (Int.Rev.Soc.Hist. 1963, 18-48 and 216-250)
- Connell, K.H. 'Catholicism and marriage in the century after the Famine'. In: Connell 'Irish Peasant Society', 113-161.
- Connell, K.H. 'Illegitimacy before the famine'. In: Connell 'Irish Peasant Society', 51-86.
- Connell, K.H. 'Irish Peasant Society: four historical essays'. (O.U.P. 1968)
- Connell, K.H. 'Land and population in Ireland 1780-1845'. (E.H.R. 1950, 278-289)
- Connell, K.H. 'The Land Legislation and Irish Social Life'. (E.H.R. 1958, 1-7)
- Connell, K.H. 'Peasant marriage in Ireland: its structure and development since the famine'. (E.H.R. 1962, 502-523)
- Connell, K.H. 'Peasant marriage in Ireland after the Great Famine'. (P.&P. 1957, 76-91)
- Coombs, L.C. et al 'Pre-marital pregnancy and status before and after marriage'. (A.J.S. 1970, 800-820)
- Cooper, J.P. 'Patterns of inheritance and settlement by great landowners from the 15th to the 18th centuries'. In: Goody 'Family and Inheritance', 192-327.

- Croog, S.H. 'Aspects of the cultural background of premarital pregnancy in Denmark'. (Social Forces 1951, 215-219)
- Cummins, M. 'Police and petting: informal enforcement of sexual standards'. In: Henslin 'Studies in the Sociology of Sex', 225-241)
- Davies, K.M. 'The sacred condition of equality - how original were Puritan doctrines of marriage'. (Social History 1977, 563-580)
- Demos, J. 'A Little Commonwealth: family life in Plymouth Colony'. (OUP 1970)
- Doten, D. 'The Art of Bundling'. (Oxford 1938)
- Drake, M. 'Population and society in Norway 1735-1865'. (Cambridge 1969)
- Drake, M. (ed) 'Population in Industrialisation'. (London 1969)
- Emmett, I. 'A North Wales Village: a social anthropological study'. (London 1964)
- Erickson, A.B. and McCarthy, J.R. 'The Yelverton Case: civil legislation and marriage'. (Vict. St. 1970-1971, 275-291)
- Erikson, K.T. 'Wayward Puritans: a study in the sociology of deviance'. (New York 1966)
- Flaherty, D.H. 'Privacy in Colonial New England'. (Virginia UP 1972)
- Fortes, M. 'Introduction' to 'The Developmental Cycle in Domestic Groups', ed J. Goody, 1-14. (CUP 1958)
- Fox, R. 'Kinship and Marriage'. (London 1967)

- Glass, D.V. 'Fertility trends in Europe since the second World War'. (Pop.St. 1968, 103-147)
- Goethals, G.W. 'Factors affecting permissive and non-permissive rules regarding premarital sex'. In: Henslin 'Studies in the Sociology of Sex', 9-26.
- Goode, W.J. 'The family'. (Prentice-Hall 1964)
- Goode, W.J. 'Illegitimacy, anomie and cultural penetration'. (A.S.R. 1961, 910-925)
- Goode, W.J. 'Illegitimacy in the Caribbean social structure'. (A.S.R. 1960, 21-30)
- Goode, W.J. 'Marriage among the English nobility in the 16th and 17th centuries: a comment'. (C.St. S.H. 1960-1961, 207-214)
- Goode, W.J. 'The theoretical importance of love'. Reprinted in: Sussman 'Sourcebook in Marriage and the Family', 249-257.
- Goode, W.J. 'World Revolution and Family Patterns'. (London 1963)
- Goode, W.J. (ed) 'Readings on the family and society'. (Prentice-Hall 1964)
- Goody, J. 'A comparative approach to incest and adultery'. (B.J.S. 1956, 286-305)
- Goody, J. 'Inheritance, property and women: some comparative considerations'. In: Goody, 'Family and Inheritance', D-36.
- Goody, J., Thrisk, J., and Thompson, E.P. (eds) 'Family and inheritance: rural society in Western Europe 1200-1800'. (C.U.P. 1976)

- Gordon, M. 'From an unfortunate necessity to a cult of mutual orgasm: sex in American marital education literature 1830-1940'. In: Henslin 'Studies in the Sociology of Sex', 53-77.
- Gordon, M. and Bernstein, M.C. 'Mate choice and domestic life in the 19th century marriage manual'. (J.M.&F. 1970, 665-674)
- Gottschalk, L., Kluckhohn, C., and Angell, R. 'The use of personal documents in history, anthropology and sociology'. (Social Science Research Council Bulletin 53) (New York 1945)
- Greven, P.J. 'Four Generations; population, land and family in colonial Andover, Massachussetts'. (Cornell U.P. 1970)
- Habakkuk, H.J. 'Family structure and economic change in 19th century Europe'. In: Bell and Vogel 'A modern introduction', 163-172.
- Habakkuk, H.J. 'Marriage settlements in the 18th century'. (Transactions of the Royal Historical Society 1950, 15-30)
- Hair, P.E.H. 'Bridal pregnancy in Rural England in earlier centuries'. (Pop.St. 1966-1967, 233-243)
- Hair, P.E.H. 'Bridal pregnancy in earlier Rural England further examined'. (Pop.St. 1970, 59-70)
- Hajnal, J. 'European marriage patterns in perspective'. In: 'Population in History', ed. D.V.Glass and D.E.C. Eversley, 101-143. (London 1965)
- Halpern, B. 'History, sociology and contemporary area studies'. (A.J.S. 1957, 1-10)

- Hammel, E.A. 'The zadruga as process'. In: Laslett & Wall 'Household and Family in Past Time'; 335-374.
- Hartley, S.F. 'Standard procedures in the analysis of cross-national variation in illegitimacy measures'. (Journal of Biosocial Science 1970, 95-109)
- Henretta, J.A. 'The morphology of New England society in the Colonial Period'. (J.I.H. 1971, 380-398)
- Henslin, J.M. 'The sociological point of view'. In: Henslin 'Studies in the Sociology of Sex', 1-6.
- Henslin, J.M. (ed) 'Studies in the Sociology of Sex'. (New York 1971)
- Homans, G.C. 'English villagers of the 13th century'. (New York 1970)
- Hood, R. and Sparks, R. 'Key Issues in Criminology'. (London 1970)
- Houghton, W.E. 'The Victorian Frame of Mind 1830-1870'. (O.U.P. 1957)
- Howell, C. 'Peasant inheritance customs in the Midlands 1280-1700'. In: Goody 'Family and Inheritance', 112-155.
- Humphreys, L. 'Impersonal sex and perceived satisfaction'. In: Henslin 'Studies in the Sociology of Sex', 351-374.
- James, M. 'Family, Lineage, and Civil Society: a study of society, politics and mentality in the Durham region 1500-1640'. (O.U.P. 1974)

- Kiernan, V.G. 'Private property in history'. In: Goody 'Family and Inheritance', 361-398.
- Knodel, J. 'Law, marriage and illegitimacy in 19th century Germany'. (Pop.St. 1967, 279-294)
- Knodel, J. 'Bavarian village': 'Two-and-a-half centuries of demographic history in a Bavarian village'. (Pop.St. 1970, 353-376)
- Knodel, J. and Van De Walle, E. 'Breast feeding, fertility and infant mortality: an analysis of some early German data'. (Pop.St. 1967, 109-131)
- Lachenbruch, P.A. 'Frequency and timing of intercourse: its relation to probability of conception'. (Pop. St. 1967, 23-31)
- Lancaster, L. 'Some conceptual problems in the study of family and kin ties in the British Isles'. (B.J.S. 1961, 317-333)
- Lantz, H. et al 'Pre-industrial patterns in the colonial family in America: a content analysis of colonial magazines'. (A.S.R. 1968, 413-426)
- Lantz, H. et al 'The pre-industrial family in America: a further examination of early magazines'. (A.J.S. 1973, 566-588)
- Laslett, P. 'Family life and illicit love in earlier generations'. (C.U.P. 1977)
- Laslett, P. 'The World We Have Lost'. (2 ed London 1971)
- Laslett, P. and Oosterveen, K. 'Long-term trends in Bastardy in England: a study of the illegitimacy figures in the parish registers and in the reports of the Registrar General, 1561-1960'. (Pop.St. 1973, 255-286)

- Laslett, P. and  
Wall, R. (eds) 'Household and family in past time'. (C.U.P. 1972)
- Lee, R.W. 'The elements of Roman Law with a translation of the Institutes of Justinian'. (London 1956)
- Le Roy Ladurie, E. 'Family structures and inheritance customs in 16th century France'. In: Goody 'Family and Inheritance', 37-70.
- Lipset, S. and  
Hofstadter, R. (eds) 'Sociology and history'. (New York 1968)
- Lockridge, K.A. 'Land, population and the evolution of New England Society 1630-1790'. (P&P 1968, 62-80)
- Macfarlane, A. 'The family life of Ralph Josselin'. (C.U.P. 1970)
- Macfarlane, A. 'The regulation of marital and sexual relationships in 17th century England'. (M.Phil.Th. London 1968)
- Macfarlane, A. 'Witchcraft in Tudor and Stuart England'. (London 1970)
- Maisch, H. 'Incest'. Trans. C.Bearne. (London 1973)
- Manning, R.B. 'Religion and society in Elizabethan Sussex: a study of the enforcement of the religious settlement 1558-1603'. (Leicester U.P. 1969)
- Marchant, R.A. 'The Church under the Law: Justice, Administration and Discipline in the Diocese of York 1560-1640'. (C.U.P. 1969)
- Marcus, S. 'The Other Victorians: a study of sexuality and pornography in mid-nineteenth century England'. (London 1966)

- May, G. 'Social control of sexual expression'.  
(London 1930)
- Mazlish, B. 'A comment on '17th century attitudes toward deviant sex'.' (J.I.H. 1971, 468-472)
- Mead, M. 'Coming of Age in Samoa'. (London 1971)
- Mead, M. 'Growing Up in New Guinea'. (London 1970)
- Money, J. (ed) 'Sex research: new developments'. (New York 1965)
- Morgan, E.S. 'The Puritans and Sex'. (N.E.Q. 1942, 591-607)
- Morgan, E.S. 'The Puritan Family: religion and domestic relations in 17th century New England'.  
(New York 1966)
- Nimkoff, M. and 'Types of family and types of economy'.  
Middleton, R. (A.J.S. 1960, 215-225)
- Pinchbeck, I. 'Social attitudes to the problem of illegitimacy'. (B.J.S. 1955, 309-323)
- Potter, R.G. 'Birth intervals: structure and change'.  
(Pop.St. 1963, 155-166)
- Powell, C.L. 'Marriage in early New England'. (N.E.Q. 1928, 323-334)
- Reiss, I. 'The family system in America'. (New York 1971)
- Reiss, I. 'Pre-marital sex as deviant behaviour: an application of current approaches to deviance'. (A.S.R. 1970, 78-87)
- Rheinstein, M. 'Marriage stability, divorce and the law'.  
(Chicago U.P. 1972)



- Rutman, D. 'Husbandmen of Plymouth; farms and villages in the Old Colony 1620-1692'. (Boston 1968)
- Sabean, D. 'Aspects of kinship behaviour and property in rural Western Europe before 1800'. In: Goody 'Family and Inheritance', 96-111.
- Sagarin, E. 'Sex research and sociology: retrospective and prospective'. In: Henslin 'Studies in the Sociology of Sex', 377-408.
- Seligman, B.Z. 'Incest and descent, their influence on social organisation'. (Jrn. Royal Anthropological Inst. 1929, 231-272)
- Shanas, E. and Streib, G. (eds) 'Social structure and the family: generational relations'. (Prentice-Hall 1965)
- Shanin, T. 'The peasantry as a political factor'. (Soc. Rev. 1960, 5-27)
- Sherwin, R.V. 'The law and sexual relationships'. (Jrn. Social Issues 1966, 109-122)
- Shorter, E. 'Illegitimacy, sexual revolution, and social change in modern Europe'. (J.I.H. 1971, 237-272)
- Shorter, E. 'The making of the modern family'. (London 1976)
- Shorter, E., Van De Walle, E., and Knodel, J. 'The decline of non-marital fertility in Europe'. (Pop.St. 1971, 375-394)
- Showalter, E. and Showalter, E. 'Victorian Women and Menstruation'. (Vict. St. 1970-1971, 83-89)
- Smith, D.S. 'The demographic history of colonial New England'. (Jrn. Econ. Hist. 1972, 165-184)

- Spengler, J.J. 'Values and fertility analysis'. In: 'Readings on population' ed. D.M.Heer, 96-119. (Prentice-Hall 1968)
- Spufford, M. 'Peasant inheritance customs and land distribution in Cambridgeshire from the 16th to the 18th centuries'. In: Goody, 'Family and Inheritance', 156-176.
- Stone, L. 'Marriage among the English nobility in the 16th and 17th centuries'. (Comp.St. in Society and History 1960-1961, 182-206)
- Stys, W. 'Influence of economic conditions on the fertility of peasant women'. (Pop.St. 1957-1958, 136-148)
- Sussman, M.B. 'Relationships of adult children with their parents in the United States'. In: Shanas and Streib 'Social structure and the family', 62-92.
- Sussman, M.B. (ed) 'Sourcebook in marriage and the family'. (Boston 1968)
- Sussman, M.B. and Burchinal, L.G. 'Kin family network: unheralded structure in current conceptualization of family functioning'. In: Anderson 'Sociology of the family', 99-119.
- Taylor, L. 'Deviance and society'. (London 1973)
- Thirsk, J. 'The European debate on customs of inheritance 1500-1700'. In: Goody 'Family and Inheritance', 177-191.
- Thomas, K. 'The double standard'. (Jrn.History of Ideas 1959, 195-216)

- Thomas, K. 'Religion and the decline of magic: studies in popular beliefs in 16th and 17th century England'. (London 1971)
- Van De Walle, E. 'Recent approaches to past childhoods'. (J.I.H. 1971, 359-365)
- Van Gennep, A. 'The rites of passage'. Trans. M.B.Vizedom and G.L.Caffee. (London 1960)
- Vincent, C.E. 'Unmarried fathers and the mores: 'sexual exploiter' as an ex post facto label'. (A.S.R. 1960, 40-46)
- Weber, M. 'The Protestant ethic and the spirit of capitalism'. Trans. T.Parsons. (London 1952)
- Wells, R.V. 'Demographic change and the life cycle of American families'. (J.I.H. 1971, 273-282)
- Wells, R.V. 'Quaker marriage patterns in a colonial perspective'. (W.&M.Q. 1972, 415-442)
- Werner, O.H. 'The unmarried mother in German literature with special reference to the period 1770-1800'. (New York 1917)
- Whelan, E. 'The temporal relationship of marriage, conception, and birth in Massachussetts'. (Demography 1972, 399-414)
- Williams, W.M. 'The sociology of an English village: Gosforth'. (London 1956)
- Williams, W.M. 'A West country village: Ashworthy; family, kinship and land'. (London 1963)
- Willmott, P. 'Kinship and social legislation'. (B.J.S. 1958, 126-142)

- Winch, R.F. 'Need complementarity reassessed'. In:  
Anderson 'Sociology of the family', 756-762.
- Wolff, K.H. 'Sociology and history: theory and practice'.  
(A.J.S. 1959, 32-38)
- Wrigley, E.A. 'Family limitation in pre-industrial  
England'. (E.H.R. 1966, 82-109)
- Young, L. 'Out of Wedlock'. (New York 1954)
- Zimmerman, C. and  
Frampton, M. 'Family and society: a study of the  
sociology of reconstruction'. (London 1936)
-

Appendix 1: NOTES ON SOURCES.

1.1. The 'Catechism of 1552'.

The 'Catechism' is usually attributed to John Hamilton or (by tradition) to John Wynram. It was one of the large number of reforms enjoined by the Provincial Synod of Scotland between 1549 and 1559, and was thus an integral part of the effort to revitalise the Catholic Church in Scotland.

The heresies and dissensions which were the prelude to the Reformation, were blamed partly on immorality and ignorance, not least among the clergy. The 'Catechism' was intended to partly remedy the latter - to educate the clergy and the leading laity, and through them the mass of people. The Provincial Council of 1552 ordered the publication of the 'Catechism', "that is to say, a plain and easy statement and explanation of the rudiments of the faith". It was to be written in Scots and was intended for the clergy and certain trustworthy laymen. The work was to be subjected to

"the most elaborate revision, approved by the opinions and votes of the most prudent prelates in the whole realm, and of the most learned theologians and other churchmen taking part in the proceedings of the present convention".<sup>1</sup>

Orthodoxy was stressed again in the preface to the 'Catechism' which claimed it contained

"brevely and trewly, the sowmme of our christian doctrin, agreand in all pointis to the wordis of halye scripture, trew expositioun of the auld and catholik doctouris, and in materis of contraversie, agreand to the decisiouns and determinatiouns of general  
1 'Statutes'; 144, no.243.

counsallis, lawchfully gaderit in the spreit for the corroboratioun of our faith".<sup>1</sup>

The Church provided for the 'Catechism' to be known as widely as possible. Though the ownership of the book was restricted, the Provincial Council of 1552 ordained that the 'Catechism' was to be read from by the rectors, vicars or curates in charge of parishes with the greatest possible reverence,

"on all Sundays and holydays on which the people are wont and bound to hear mass, for the space of half an hour before high mass, in a loud and audible voice, ..."<sup>2</sup>

There is little evidence to show if the clergy did this.

Considering the care taken with the book, it is surprising how minimal its influence appears to have been. The editor of the text suggests that it can be inferred from the single reference made to it in the synod of 1559 that the regulations for its public reading were either disregarded or ineffectual. He adds that the 'Catechism' "passes out of sight almost as soon as it is printed. Catholic writers of the next generation seem to have forgotten it, or, at least, make no use of it".<sup>3</sup>

The theological orthodoxy of the 'Catechism' can also be questioned. Both Patrick and Law see it as representing a liberal school of Catholic theology, and as revealing the influence of the new learning. Law compares the burning in effigy of Sir John Borthwick for heresy twelve years previously in front of Hamilton, Wynram and Major, with the lack of refutation or contradiction of the heresies in the 'Catechism'. It did, however, contain thoughts and language borrowed from the formularies of Henry VIII.<sup>4</sup>

1 'Catechism'; 5, preface.

2 'Statutes'; 146, no.253.

3 'Catechism'; ix.

4 'Catechism'; xli-xlii.

Law also sees differences in emphasis in the treatment of Justification by Faith, the honour to be shown to the Virgin Mary, and the doctrine of the Immaculate Conception (which was not yet an article of faith). The authority of general councils is stressed instead of Papal power, and there is no mention made of Popes or Indulgences.<sup>1</sup> Neither of these qualifications affects the value of the 'Catechism' in this thesis: it has been used to show the 'official' view of marriage, not the beliefs of the mass of people, and its section on marriage does not include liberal theology. The significance of the 'Catechism' lies in its method of preparation and authority. As Patrick commented, the 'Catechism' forms "an invaluable supplement to the statutory enactments of the Provincial Council, and ... illustrates in a way the Statutes themselves cannot do the attitude of the Council to Catholic doctrine and tradition".<sup>2</sup>

#### 1.2. William Hay's 'Lectures on Marriage'.

These 'Lectures' were the last volume of a two volume series on the Seven Sacraments (the first volume is now missing). The published edition uses a manuscript written by Hay's private secretary between 1533 and 1535. Their compilation was made at the request of David Dishington, Rector of Aberdeen University, and the postscript states that

"this work on the Sacrament of Matrimony and its impediments, was collected and promulgated in the University of Aberdeen, and publicly read in the major schools of King's College, Aberdeen, before the solemn concourse of the theologians gathered there."<sup>3</sup>

1 'Catechism'; xxxiii-xli.

2 'Statutes'; lx.

3 Hay. 'Lectures'; 355.

The 'Lectures' are unique – they are the only extant Scottish manual on pre-Reformation Canon Law on marriage. They are a record of a Scottish churchman lecturing in a Scottish university to priests, and aspirants to the priesthood. The emphasis is not on speculative theology, but on practical solutions to problems likely to be faced by priests. The Canon Law is not dealt with in isolation, and the legal prescriptions are set out within a framework of reference which gave them meaning.

Their significance is underlined by Hay's career. He qualified as a bachelor of arts at the University of Paris in his early twenties. As his friend Boece attended lectures by Erasmus, he probably did as well. He continued his studies and became a bachelor of theology before 1504. Hay was 'subprincipal' of Aberdeen University by 1500, when Boece was 'principal' (the titles only came into being in 1505), and lectured in theology. On the latter's death, Hay became principal which position he held until 1542, the probable date of his death at about the age of sixty.

The 'Lectures' emphasise by their lack of originality that the Scottish Church was a part of the Catholic Church and that the Canon Law was as equally binding as in other places. Hay's use of sources reveals his learning and familiarity with the major works on Canon Law. Over a third of his quotations came from what was later to be codified as the 'Corpus Iuris Canonici', and the 'Lectures' could be mistaken for the work of a Continental theologian without much difficulty.

### 1.3. Statutes of the Scottish Church, 1225–1559.

This collection of statutes represents what has survived of the legislative enactments of the provincial and diocesan synods of the



Scottish Church. The statutes establish standards, regulate conduct and correct abuses. Omitted are other tasks performed by the synods - arbitrating disputes, disciplining individual cases of laxity among the clergy, and preserving the Church's collective interests against outside interference. In some ways the work of the provincial synod was similar to that of the Convention of Royal Burghs.

However, the initiative of the councils was strictly circumscribed by Canon Law: their powers were interpretative not innovatory. The editor summarises their authority succinctly:

"Provincial councils might not define doctrines, nor were they expected to initiate new legislation: their design was rather to give collective weight to the same essential duties and functions as bishops were called on singly and in their diocesan councils to discharge. They expounded, applied, adapted, and saw to the observance of laws 'elsewhere defined' - especially at general councils".<sup>1</sup>

The principles were derived from the Canon Law of the Popes and General Councils, even if their wording was taken from the national and provincial synods of the English Church, or the constitutions drawn up by individual English bishops. The statutes emphasise that the Scottish Church was part of the Catholic Church, and are the local application of its universal laws.

Their usefulness has to be qualified. The first is that the jurisdiction of the Scottish Church was not synonymous with the extent of modern Scotland. Until 1472 Galloway was within the metropolitan province of York and subject to its archbishops. Although the Outer Isles became Scottish territory in 1266 and the Bishop of Sodor had a seat in the Scottish Parliament, the diocese remained

1 'Statutes'; xlii-xliii.

subject to the diocese of Trondheim and its bishops were consecrated by the Norwegian archbishop and bishops until 1472. The Scottish Church also faced problems in exercising its authority in the areas over which it claimed jurisdiction, despite a systematic campaign started in 1070 to suppress the traditions and practices of the Celtic Church and to eradicate non-Christian 'superstitions'.

The extant records may represent only a partial record of the earlier synods. The number of statutes from the decade 1549 to 1559 nearly equals the total number of statutes surviving from the previous three-and-a-quarter centuries. This imbalance, however, may be a result of the stresses which preceded the Reformation as other evidence suggests that the earlier provincial councils were not as energetic in making enactments as those after 1549. Particular difficulties face the user of the early statutes, owing to their method of preservation. The canons of the provincial councils were meant to be read and promulgated at the annual diocesan synods, and these earlier statutes survive in the Register of the Bishoprics of St. Andrews and Aberdeen. Little care, however, was taken to distinguish between diocesan and provincial canons so that it is impossible in some cases to know under whose authority a particular statute was issued. Their dating is also subject to qualification; as Innes commented

"It does not seem unsafe to conclude that this body of laws, like other codes, though perhaps sanctioned and re-enacted at one or more definite meetings of the enacting body, was in truth its collected legislation, springing up little by little, and receiving the stamp of usage or the authority of competent courts at intervals for several centuries; so that even if we could fix, more precisely than is perhaps now possible, the era and the Council when the

collected statutes were first sanctioned as a code, it would only prove the introduction of the several laws to be not later than that time."<sup>1</sup>

These qualifications - geographical jurisdiction, provenance and date - do not affect the value of the statutes<sup>t</sup> for this thesis. They do show how the Scottish Church wished particular parts of the Canon Law to be applied. The statutes represent the views of the Church at the provincial or diocesan level. It is not necessary, in this context, to know how widespread was the knowledge of the statute. A notorial instrument, however, does show that in the final burst of activity before the Reformation attempts were made to make sure that each curate in the deanery of Linlithgow had a copy of the statutes of the previous Provincial Councils.<sup>2</sup> Secondly, the statutes do shed some light on practice as opposed to law. They show which abuses the Scottish Church felt were particularly rife and which were felt to reoccur despite previous statutes. Needless to say these are impressions and do not constitute evidence as to the actual extent of problems, or of the success of particular reforms.

#### 1.4. 'Liber Officialis Sancti Andree'.

The 'Liber Officialis' (as edited by Innes) includes all the cases of marriage, divorce and legitimacy culled from three sources. Cases numbered from 1 to 126 were taken from the 'sententiae' of the 'Liber Officialis Sancti Andree infra Archdiaconatum Laudonie', which cover the Lothians for 1512-1552. No proceedings or parts of cases were given, only the decisions whose formal insertion did not necessarily imply promulgation. Cases numbered from 127 to 170 came from the 'Liber Officialis Sancti Andree Principatus'. These are the sentences

1 Quoted by Robertson in preface to 'Concilia Scotiae', I, liv, fn.3.

2 'Prot. Bk. Johnsoune'; 76, no.375 (4 June 1555).

of the Official of the whole Diocese and Primatial see from 1541 to 1554. Their character is the same. Additional cases, not included in the digest (or the analysis) were from the 'Liber Actorum of the Official of Lothian'. This appears to have been a rough minute book of the court, and consists mainly of notes on cases from October 1546 to February 1548, only rarely including a draft of a judgement or sentence. These cases probably formed about 4-8% of the total number, excluding appeals.<sup>1</sup>

The crude attempt at an analysis was based entirely on the digest of cases given by Innes on pages liii-lv. He found difficulty in assigning cases to particular categories as many are ambiguous, and omitted 6 cases. The major problem in the analysis is that the categories were not exclusive. A distinction was made between those categories which were the basis of a suit, and those which were the outcome. The latter were collapsed into the former: i.e. the following were excluded:-

- decrees of adherence,
- dissolution of marriage contract,
- aliment awarded,
- legitimation of children,
- children declared illegitimate,
- restitution of dowry,
- forfeiture of dowry,
- remarrying allowed,
- remarrying forbidden,
- expenses awarded.

1 The figures are from Donaldson 'The Church Courts'; 365-366.

Only 9 of these cases did not fit into the remaining categories.

The remaining cases were then tabulated according to the category in which they first appeared in the digest. The effect was:

No. 28 assigned to consanguinity instead of consummated betrothal voided by existing consummated betrothal.

No. 147 assigned to affinity rather than adultery.

No. 152 assigned to affinity rather than impuberty.

No. 165 assigned to impuberty rather than circumvention.

No. 84 )  
No. 86 ) assigned to affinity rather than solemnisation of marriage.  
No. 145 )

No. 134 assigned to 'sevitia' rather than solemnisation.

No. 123 assigned to solemn marriage voided by existing solemn marriage rather than solemnisation.

No. 33 assigned to solemn marriage voided by existing betrothal rather than betrothal voided by solemn marriage.

The final assignments were:

Suits for separation or divorce on the grounds of -

1. Consanguinity: 11, 15, 27, 28, 36, 37, 39, 42, 57, 58, 59, 63, 73, 74, 78, 82, 89, 95, 96, 112, 114, 115, 124, 126; 136, 142, 150, 159, 161, 163.
2. Affinity: 3, 5, 7, 8, 12, 16, 18, 22, 24, 26, 29, 31, 32, 38, 43, 44, 47, 48, 49, 50, 52, 55, 60, 61, 62, 65, 66, 68, 70, 72, 79, 81, 83, 84, 85, 86, 87, 88, 91, 92, 94, 97, 98, 99, 101, 103, 113, 116, 117, 121; 127, 129, 133, 135, 138, 145, 147, 151, 152, 153, 155, 167.
3. 'Cognatio spiritualis': 156.
4. Impuberty: 41; 165.
5. Impotency: 13; 137, 139.

6. Force: 6, 20, 35, 40.
7. Adultery: 1, 51, 54, 93, 107, 110, 111; 128, 140, 148, 164.
8. 'Sevitia': 76; 131, 134, 149, 158.

A solemn marriage voided by -

9. Pre-existing solemn marriage: 14, 34, 125.
10. Pre-existing 'sponsalia per verba de futuro carnali copula subsecuta': 30, 33, 53, 102, 119, 123.

A marriage by 'sponsalia per verba de futuro carnali copula subsecuta' voided by -

11. Pre-existing solemn marriage: 2, 90.
12. Pre-existing 'sponsalia per verba de praesenti': 80.
13. Pre-existing 'sponsalia per verba de futuro cum copula': 4, 17, 77.
14. 'Sponsalia per verba de futuro sine copula' voided by subsequent 'sponsalia per verba de futuro cum copula': 19.
15. Suits for solemnisation of marriage: 21, 56, 105, 106, 109; 143, 154, 166, 168.
16. Absolving 'a vinculo juramenti': 9, 10, 45, 46.
17. Cases of status and succession: 67, 75, 100; 146, 157, 169, 170.
18. Damages for seduction: 130.
19. Cases not in digest: 23, 25, 64, 118, 120; 141.
20. Cases excluded from categories: 69, 71, 104, 108, 122; 132, 144, 160, 162.

Category	Cases numbered		Total
	1-126	127-170	
1	24	6	30
2	50	12	62
3	0	1	1
4	1	1	2
5	1	2	3
6	4	0	4
7	7	4	11
8	1	4	5
9	3	0	3
10	6	0	6
11	2	0	2
12	1	0	1
13	3	0	3
14	1	0	1
15	5	4	9
16	4	0	4
17	3	4	7
18	0	1	1
19	5	1	6
20	5	4	9
Total	126	44	170

Appendix 2: AGE OF MARRIAGE post 1560.

The age of marriage under Canon Law was the same as that under Roman Law - 14 for males, and 12 for females.<sup>1</sup> This was confirmed in the first 'Book of Discipline':

"Marriage ought not to be contracted amongst persons that have no election for lack of understanding; and therefore we affirm, that bairns and infants cannot lawfully be married in their minor age, to wit, the man within fourteen years of age, and the woman within twelve years, at the least. Which if it chance any to have been, and have kept their bodies always separate, we cannot judge them bound to adhere as man and wife, by reason of that promise, which in God's presence was no promise at all. But if in the years of judgment they have embraced the one the other, then by reason of their last consent, they have ratified that which others did promise for them in their youth-head."<sup>2</sup>

The first qualification emphasises that the age of marriage is not equivalent to the modern age of consent. If the couple did have intercourse, the inference is that the marriage was lawful. As under Canon Law (see 3.5.1.), sexual competency and reason were the two characteristics of maturity, and in disputed cases proof of potency was sufficient to prove maturity. There was no direct equivalent to the modern crime of having intercourse with an under-age person - this was probably covered by the legislation against rape in so far as the adult party was concerned.

The second qualification is probably intended to deal with childhood betrothals. The validity of the marriage is based on the intercourse expressing mutual consent. This is similar to future

1 Lee. 'Roman Law'; 63-64, 99.

2 'Bk.of Disc.'; 317-318.



promise and subsequent intercourse as a proof of marriage, although in this case the future promise had been made by others.

These ages were also accepted by the civil law. For instance, in the case of Kennedy versus Kennedy of 1595 it was argued that,

"it is a veritie, that of the law and practick of this realm, inviolabiliter observit and kepit past memory of man" that no woman under the age of twelve can marry.<sup>1</sup>

It is something of a surprise to find that doubt continued to exist as to the age of marriage after a thousand years. This, however, is the inference of a decision by the General Assembly in 1600:

"Forsameikle as diverse and great inconveniences arises daylie through the untimeous marriage of young and tender persons befor they come to age meit for marriage; and that ther is no law, nor statute of the Kirk, [made] as yet defining the age of persons to be married: Therfor it is statute and ordainit, that no Minister within this realme presume to joine in matrimonie [any persons] in time coming, except the man be of fourteen yeiris, and the woman of twelve yeirs at the leist: ordaining likewayes the Commissioners of the Generall Assemblie to desine this statute to be ratified in the Conventione."<sup>2</sup>

Perhaps some doubts had been raised as to the legal status of the age of marriage because, as it was pointed out, there was no statute of the Church or Parliament that set out the ages. This act may have been intended to give the stamp of authority to custom. Possibly doubts had been cast in several law suits - for instance, involving child betrothal - which had attracted the attention of the Church. There was, however, no subsequent Act of Parliament,

1 Fraser. 'Husband and Wife'; I, 51.  
Balfour. 'Practicks'; 227.

2 'B.U.K.'; III, 953.

quite probably because they saw no point in raising a matter which had been fixed for so long. These ages were not altered until 1929 when they were raised to sixteen years.<sup>1</sup>

---

1 Ashley. 'Honourable Estate'; 52.

### Appendix 3: PARRICIDE.

Many of the laws enacted by the General Assembly and by Parliament in the 1560's - for example, those against fornication, adultery and incest - were based on the Old Testament, particularly Leviticus and Deuteronomy. Not all scriptural injunctions, however, were carried into law at that time. An example of this is the punishment of cursers of parents: Leviticus XX lays down that

"For every one that curseth his father or his mother shall be surely put to death: he hath cursed his father or his mother; his blood shall be upon him".<sup>1</sup>

This was not incorporated into Scottish law until Parliament passed an Act in 1649, although an Act anent children murdering their parents was passed in 1594. This suggests that the reason for the Act of 1649, and the similar one in 1661, was more than a desire to bring Scots law into alignment with Biblical law. It is possible that the answer lies in the beheading of Charles I on 30 January 1649, some 5 weeks before the Act was passed. The execution of the 'father of the people' may have created fears that similar attacks would be made on the authority of the father within a familial context. The Act of 1649 was after all unusual in being re-enacted with few changes at the Restoration. Alternatively, it may be associated in some way with irregular marriages and parental consent as the Act of 1649 anent clandestine marriages shared the distinction of being re-enacted in 1661. The Act of 1594 was passed by Parliament because of

"the abhominable and odious crueltie that his bene at suntimes heirtofoir usit within this realme be children aganis thair parentis in murthering of thame and takand of thair lives unnaturally".<sup>2</sup>

1 Leviticus: XX, 9. See also: Deuteronomy; XXI, 18-21.

2 'A.P.S'; IV, 69.

In addition to the usual punishments for murder, the Act added disinheritance in the direct line and the next nearest line of consanguinity of the murderer.

An Act specifically against strikers or cursers of parents was passed in Articles in 1639; it did not, however, reach the statute book until ten years later. It was ordained that

"whatsoever sonne or dochter above the age of Sixtene yeiris not being Distracted shall ather beat or curse ather their father or their mother shall be put to Death without mercie And such as are within the age of sixtene years To be punished at the arbitrimēt of the Judge according to thair deservengis That other<sup>s</sup> ~~may~~ hear and fear and not doe the lik."<sup>1</sup>

This Act was re-enacted word for word in 1661, apart from excluding those under the age of pupillarity (12 for females, 14 for males) from punishment.<sup>2</sup>

Perhaps it is more than coincidence that these Acts were passed at about the same time as those against irregular marriages, and that both were re-enacted at the Restoration unlike the Acts of 1649 against incest and adultery. The Acts were -

1639	11 Sept.	Supplication by the General Assembly for the prohibition of marriage across the borders.
	21 Oct.	Act anent parents past in Articles.
1649	13 Feb.	Act anent clandestine marriages.
	3 March.	Act anent parents.
1661	16 May.	Act anent parents.
	22 May.	Act anent clandestine marriages.

1 'A.P.S'; VI, pt II, 231.

2 'A.P.S'; VII, 202.

It is probably significant that these Acts against irregular marriages were partly concerned with marriages without the consent of parents. These laws against parricide may be part of the same emphasis on the power of parents. Their purpose may have been to declare that the authority of the parent over their children was legitimate, incontrovertible, and supported by the authority of the State.

It is difficult to imagine that these Acts were applied in cases other than murder or grievous assault. According to MacKenzie the Act of 1661 was applied particularly to infanticide -

"Parricide is committed by Mothers against their Children, and Women daily are convict thereof".<sup>1</sup>

---

1 MacKenzie. 'Laws and Customs'; 152-154. He comments also that the law did not include affines, eg. mother-in-law, father-in-law.

Appendix 4. INCEST: digest of cases where relationship of affinity  
contracted by intercourse alone: 1625 to 1729.

1625. Presbytery of Ellon found two brothers guilty of incest with Helen Hunter, who had borne a child to the third brother.

(Foster. 'Ecc.Admin.'; 186-187.)

1631. Alexander Mure of Skaithmure: incest with two sisters upon whom children were procreated.

('R.P.C.'; IV<sup>2</sup>, 225, 317.)

1633. William Johnston cohabited with Margaret Hunter and fathered a child on her daughter.

('R.P.C.'; V<sup>2</sup>, 146.)

1641. John Kirks in Sundaywall: adultery and incest with two lawful sisters, both of whom bore him children.

('Just.Cases'; II, 507-508.)

1643. Janet Imrie beheaded for being the paramour of two brothers.

(Chambers. 'Domestic Annals'; II, 29.)

1646. Jean Knox beheaded for marrying one brother after becoming pregnant to another.

('Just.Cases'; II, xliv-xlv.

MacKenzie. 'Laws'; 160.)

1669. Callum-oig-Mcgregor: hanged for theft, robbery, sorning and incest with two sisters.

('Just. Court'; I, 315).

1703. Commission of the General Assembly called on the Lord Advocate "to advise whether legal action could be taken against John Wodhart for incest, a woman dying in child-birth having accused him of fornication with her after she had told him of previous guilt with his brother".

(Graham. 'Ecc.Disc.'; 47.)

1705. James Welsh rebuked by Presbytery of Penpont for slandering a neighbour by saying that he "had played with one sister, and if he married the other it would be incestuous".

(Graham. 'Ecc.Disc.'; 127.)

1710. Wodrow wrote to his wife that the General Assembly had resolved that marrying a person who had committed fornication with the man's grand-uncle was incest.

(Graham. 'Ecc.Disc.'; 169)

1725. John Scot, before the Presbytery of St.Andrews, confessed incest with "Mary Scot his niece by Alexander Scot an adulterous bastard son of his fathers".

(Graham. 'Ecc.Disc.'; 170)

1729. Robert Hunter appeared before Synod of Angus and Means for marrying a woman who had borne a child to his grand-uncle.

(Graham. 'Ecc.Disc.'; 169.)

---

## Appendix 5: SODOMY AND BESTIALITY.

Very little material has been found on these two sexual crimes. Both are notable for their absence in commentaries and statute law, although cases do occur quite regularly. They appear to be unspeakable crimes. In this appendix are cited the Biblical references, MacKenzie's comments, and a list of cases.

The list is not an exhaustive calendar of cases. Many are taken from Nicoll's diary, or from commissions granted by the Privy Council which often do not give the outcome of a case. Death invariably appears to have been the penalty, both for the man and for the animal. The adjectives used match the punishment: most filthy, abominable, odious, detestable. The animals are usually cows and mares; pigs and sheep are not mentioned. Significantly, the offenders were all bound over to the civil authorities in the 4 cases of bestiality noted by Graham: this did not occur in all the cases of incest before the Church Courts. Most of the cases refer to bestiality and only few deal with buggery.

It is possible that these cases represent a small proportion of offences. In Plymouth Colony, for example, the early records show that between one-fifth and one-fourth of prosecutions for all sex offences were for various homosexual practices. Perhaps the situation in Scotland was similar to that in Massachusetts Bay where, though there are few cases of actual sodomy, there are many records of 'defiling', 'uncleanness', 'unclean practices', etc., which may have been euphemisms for forms of homosexual behaviour.

(May. 'Social Control of Sex'; 195.)

### Biblical law.

"If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination, they shall surely be put to death; their blood shall be upon them."

(Leviticus. XX, 13.)



"And if a man be with a beast, he shall surely be put to death: and ye shall slay the beast. And if a woman approach unto any beast, and lie down thereto, thou shalt kill the woman, and the beast: they shall surely be put to death; their blood shall be upon them."  
(Leviticus. XX, 15-16)

Scottish law.

"We have no particular statute for punishing either Sodomy, or Bestiality, for they are crimes extraordinary, and rarely committed in this Kingdom: but our Libels bear, That albeit the Law of the Omnipotent God, as it is declared in the 20 of Leviticus. 'As well the man who lieth with mankind, as man who lieth with a beast, be punishable by death'. Yet etc. the ordinar punishment in both these, is burning, and the beast also burnt, with which the Bestiality is committed: ... Yet sometimes it is only punished by hanging ... and James Wilson was only hanged for the same crime, 15 Feb. 1649. which last Sentence bore, that the execution should be very early in the morning, and ordained the Mare with which the Buggery was committed, to be drowned in any Mosse or Loach."  
(MacKenzie. 'Laws and Customs'; 161-162: see also 160, 557.)

Cases.

5 February 1622. Commission. William Young, son to John Young in Quha, accused of a "bestly and abominable crime" by Janet Weir.  
( 'R.P.C.'; XII<sup>1</sup>, 641.)

28 September 1625. Commission for the trial of James Barrie, son to James Barrie, burgess of Hamilton. On his apprehension he confessed to "most filthelie converst with ane kow".  
( 'R.P.C.'; I<sup>2</sup>, 146.)

9 March 1625. "Compeired Elspeth Faulds and Margaret Armour, ... parishioners of Eglishame, who upon the information of thair slaunderous behaviour of Sodomy were inhibited others company ... under the paine of excommunicatioun".

('R.P.Glasgow'; 426.)

22 March 1626. John Crawford and George Dagleishes: "for thair extraordinar and filthie abuse, not to be written nor to be maid mention of, and notourlie knownen to the whol parishioneris of Cader".

('R.P.Glasgow'; 427.)

2 June 1626. Commission to try William Scott, servant, who has been apprehended for a bestial offence.

('R.P.C.'; I<sup>2</sup>, 293.)

17 February 1629. Commission to try Ewen McEwen who, according to the Presbytery of Iain, "hes committed the abominable and odious crime of sodomie by covering of ane meir and using carnal copulatioun with her".

('R.P.C.'; III<sup>2</sup>, 52.)

July 1642. John Logie hanged for bestiality.

(MacKenzie. 'Laws and Customs'; 162.)

15 February 1649. James Wilson hanged for bestiality, and the mare ordered to be drowned.

(MacKenzie. 'Laws and Customs'; 162.)

30 May 1650. James Fiddes "was brint in Edinburgh for<sup>1</sup>lyeing with a kow; both he and the kow war brint upone the Castell-hill of Edinburgh".

(Nicoll. 'Diary'; 15.

MacKenzie. 'Laws and Customs'; 162.)

August 1650. "Ther was a herdman in Angus, that dwelt under the Lord Didoppe, that had layen with a cowe, (others said with a maire also); both he and the said cowe were brunt att Dundie".

(Lamont. 'Diary'; 22.)

September 1652. "Robert Seaton, one of the plowe-men of Lundy, fled upon a report raised that he had lyen severall times with severall mairs, about the Ouermourton of Lundy; his fleing does confirme the treuth of the report. Will. Miller, miller in Lundie mille, did reveill this fact att Cuper, Sept.14, before some of the Englishes appointed to try such grosse faults. He was apprehended in Louthian, and sent to Stirling the 23 of Sept. wher he was appointed to suffer, and was executed there."

(Lamont. 'Diary'; 46.)

11 February 1653. "ane hermaphrodite cled, in womanis apparell, wes takin and execute for lyeing with a meir".

(Nicoll. 'Diary'; 106.)

"Ther was an hermophrodite hanged att Edenbroughe: it was because of uncleannesse; for the report went that he had lyen with several mens wives in Edenbroughe. (He was both man and woman, (a thing not ordinar in this kingdome); his custome was always to goe in a womans habite)."

(Lamont. 'Diary'; 53.)

This person passed by the name of Margaret Rannie.

(Chambers. 'Domestic Annals'; II, 220.)

15 October 1656. "two men, ane old, the other young, both of thame brint in the Castellhill of Edinburgh for bowgarie and bestialitie; .... likewise ane old man scourged throw the st<sup>e</sup>it of Edinburgh, for being of intentioun to bowgerie, and being at the very entrie of the act wes interruptit".

(Nicoll. 'Diary'; 185.)

10 June 1657. "ane young man wes brint thair (the Castle-hill of Edinburgh) for bestialitie".

(Nicoll. 'Diary'; 198.)

17 March 1658. "a yong boy of the age of fiftene yeiris, wes brint upone the Castelhill of Edinburgh for bestialitie with a kow".

(Nicoll. 'Diary'; 212.)

10 June 1658. "twa young boyes wer ... brint upone the Castellhill of Edinburgh, for bugarie and bestialitie".

(Nicoll. 'Diary'; 215.)

12 August 1658. "ane young man about 30 yeiris of aige, wes also brint on the Castelhill for bestialitie with ellevin ky and fow meares".

(Nicoll. 'Diary'; 216.)

9 February 1659. "ane young boy for bestialitie" was executed.

(Nicoll. 'Diary'; 227.)

Summer 1661. Sundry others were executed for bestiality.

(Nicoll. 'Diary'; 343.)

23 April 1662. "Ane young man brint on the Castehill of Edinburgh ... for bestialitie with a number of beastes, ky and meires, not to be recordit".

(Nicoll. 'Diary'; 364.)

7 May 1662. Commission to try "Robert Jameson in Lauder, who hath confest himself to be guilty of bestiality".

('R.P.C.'; I<sup>3</sup>, 208.)

9 June 1664. Commission to try Andro Traill, prisoner at Irvine, "as suspect guilty of the abominable sin of bestiality".

('R.P.C.'; I<sup>3</sup>, 541.)

9 August 1664. Commission to try Jon Wright, prisoner at Dumfries, for bestiality.

('R.P.C.'; I<sup>3</sup>, 584.)

17 August 1664. Commission to try Andro Ferguhar, prisoner at Perth, for "the most odious and detestable crime of bestiality".

('R.P.C.'; I<sup>3</sup>, 589.)

28 March 1665. Commission to try Walter Husband, vagabond, prisoner at Perth, for bestiality and theft.

('R.P.C.'; II<sup>3</sup>, 37.)

31 January 1667. Commission to try a prisoner at Jedburgh for bestiality.

('R.P.C.'; II<sup>3</sup>, 250.)

9 October 1667. Commission to try James Con in 'Mossyd of Lyn', prisoner at Irvine, for bestiality.

('R.P.C.'; II<sup>3</sup>, 354.)

15 July 1669. Commission to try William Galbraith in Glencavert, prisoner at Stirling, for bestiality. Executed.

('R.P.C.'; III<sup>3</sup>, 44-45, 95.)

9 April 1670. Major Thomas Weir indicted for incests, adulteries, fornications, and bestialities.

"he proceeded farther to the height of brutish abomination in committing Bestiality with a Mare in the year 1650 and 1651, at Newmills in the West Countrey, he having ridden there upon that Mare, and did lie with Cows and other beasts".

Found guilty of incest and bestiality, and was condemned to be executed on the 11 April, between two and four in the afternoon at the 'gallowlie' between Leith and Edinburgh. He was to be strangled at the stake until dead, and his body to be burnt to ashes.

('Just. Court.'; II, 10-11, 14.

Lamont. 'Diary'; 218.

Chambers. 'Domestic Annals'; II, 332-333.)

23 August 1672. David Johnston, son to David Johnston of Closeburn, was imprisoned under suspicion of bestiality. He obtained his liberty "upon his Father's petition to the Lords Commissioners, offering Caution in respect he verified he was but an Ideot and not able to entertain himself".

('Just.Court'; II, 113.)

3 August 1676. Order to transfer "Robert Gemmill in Collarie" to Edinburgh; he had been apprehended for bestiality by the Earl of Kilmarnock.

('R.P.C.'; V<sup>3</sup>, 31.)

12 November 1691. Order to transfer Thomas Wishart to Edinburgh to stand trial for bestiality.

('R.P.C.'; XVI<sup>3</sup>, 590, 592-593.)

The following cases are taken from the work by Graham. All the cases of bestiality were bound over to the civil authorities.

2 May 1693. Presbytery of Hamilton. Ninian Cassels - alleged to have committed bestiality 45 years before.

29 August 1699. Presbytery of Haddington. Bestiality.

12 June 1707. Presbytery of Chanonry. Bestiality.

5 August 1712. Presbytery of Duns. Sodomy.

6 April 1713. Kirk session of Kirkinner. Bestiality.

(Graham. 'Ecc.Disc.'; 77, 172-173.)

(See also: Arnot 'Celebrated Crim Trials', 311).

## Appendix 6. OFFENCES HEARD BY SAMPLE OF CHURCH COURTS 1690-1730.

i. Kirk sessions

Offence	No	%	No	%
Cursing	144	15	144	6
Sabbath breaking	340	36	340	14
Drunkenness	186	20	186	8
Fighting	134	14	134	5
Charming	15	2	15	+
Civil	19	2	19	+
Slander	102	11	102	4
Total non-sexual	940	100%	940	38%
Scandalous carriage	86	6	86	4
Fornication: once	916	61	1,082	44
2 x	130	9		
3 x	28	2		
4 x	7	+		
5 x	1	+		
Ante-nuptial fornication	226	15	226	9
Adultery: once	79	5	82	3
relapse	3	+		
Incest	6	+	6	+
Irregular marriage	21	1	21	+
Total marital/sexual offences	1,503	100%	1,503	62%
Total offences			2,443	100%

- N.B. a) actual number of cases is 2,379.  
b) total number of years included is 1,117.  
c) the fifty kirk sessions and the number of offences before each session is listed in Graham, 'Ecc.Disc.'; app.C, 1-8.  
d) percentages are rounded to the nearest whole number;  
+ equals less than 1%.

ii. Presbyteries

Marital/sexual offence	No	%	%
Scandalous carriage	111	8	8
Fornication: once	361	25	40
2 x	46	3	
3 x	147	10	
4 x	28	2	
5 x	8	+	
Ante-nuptial fornication	38	3	3
Adultery: once	689	47	49
2 x	18	1	
3 x	6	+	
4 x	1	+	
Incest	26	2	2
Irregular marriage	6	+	+
Total	1,459	100%	100%

- N.B. a) sexual scandals were offences in 1,517 cases (90%) out of a total of 1,692.
- b) total number of years included is 665 years (Graham).
- c) the 25 Presbyteries are given in table 6 (8.6). The number of each kind of offence and the years covered for each Presbytery are in Graham, 'Ecc. Disc.'; app.C, 9-12.
- d) percentages are rounded to the nearest whole number; + equals less than 1%.

iii. Interpretation

The above tables are based on a reworking of the cross-tabulations included in Graham's thesis. As they are derivative, they should be treated with caution and only as an approximate guide. The figures used are for offences and not cases. Once case may involve several offences. There are several qualifications which detract from the usefulness of the figures in describing behaviour rather than disciplinary



cases, viz. -

- a) the potential number of offenders is unknown;
- b) the varying commitment to punishing vice by the individual kirk sessions and presbyteries;
- c) the number of offenders involved, both in a particular case and in cases over a number of years, eg. the fornicator might be the same person in several cases rather than different people in every case;
- d) potential offenders may escape discovery;
- e) the session dealt with offences giving rise to public scandal - private rather than public admonition may have been used if the offence was secret or only known to a few.

iv. Other sources

Foster includes in 'Ecc. Admin.' (139-140, 192-193.) a breakdown of offences heard by 3 Presbyteries and 4 Kirk Sessions in particular years in the early seventeenth century. These are not directly comparable with Graham's figures as they relate to the number of persons tried for an offence, and not the number of offences. Nor are they an accurate guide to the frequency of offences for which people were tried because the particular years selected may not be 'typical', and because some cases took several years to resolve. (The percentages are rounded to the nearest whole number.)

a) Kirk sessions

Offence	Dundonald 1605		Belhelvie 1624		Culross 1632		Trinity College 1633	
	No	%	No	%	No	%	No	%
Adultery	5	5	2	3	-	-	-	-
Fornication	20	20	20	34	27	25	51	65
" relapse	-	-	-	-	-	-	10	13
Irreg. marriage	-	-	1	2	-	-	7	9
Other offences	77	75	36	61	80	75	10	13
Total	102	100	59	100	107	100	78	100

b) Presbyteries

Offence	Paisley 1606		Jedburgh 1622		Perth 1632	
	No	%	No	%	No	%
Incest	1	2	-	-	-	-
Adultery	22	38	11	25	12	63
Fornication and contumacy	17	30	9	21	-	-
Irreg. marriage	-	-	2	5	2	11
Other offences	17	30	21	49	5	26
Total	57	100	43	100	19	100